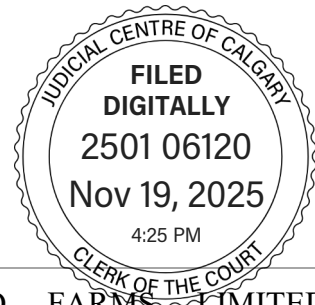


COURT FILE NO. 2503-10998
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON

Clerk's Stamp



PLAINTIFF COMPEER FINANCIAL, PCA

DEFENDANTS SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED,
SUNTERRA ENTERPRISES INC., RAY PRICE and DEBBIE
UFFELMAN

COURT FILE NO. 2501-06120

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SUNTERRA FOOD CORPORATION, TROCHU
MEAT PROCESSORS LTD., SUNTERRA QUALITY FOOD MARKETS
INC., SUNTERRA FARMS LTD., SUNWOLD FARMS LIMITED,
SUNTERRA BEEF LTD., LARIAGRA FARMS LTD., SUNTERRA
FARM ENTERPRISES LTD., SUNTERRA ENTERPRISES INC.

DOCUMENT **BOOK OF AUTHORITIES OF COMPEER FINANCIAL, PCA**

ADDRESS FOR **BENNETT JONES LLP**

SERVICE AND Barristers and Solicitors
4500, 855 – 2nd Street S.W.
CONTACT Calgary, Alberta T2P 4K7

INFORMATION OF
PARTY FILING THIS Attention: Keely Cameron/Lincoln Caylor/Nathan Shaheen/Mathieu
DOCUMENT LaFleche
Telephone No.: 403-298-3324
Fax No.: 403-265-7219
Client File No.: 099329.1

Chambers Application Scheduled for December 4-5, 2025
before The Honourable Justice Lema

INDEX

TAB	JURISPRUDENCE
1.	<i>Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.</i> , 2019 ABCA 49
2.	<i>Royal Bank of Canada v. Location Bristar Idealease Inc.</i> , 2012 QCCS 211
3.	<i>Lloyd's London, Non-Marine Underwriters v. National Armoured Ltd.</i> , 1996 CanLII 8104
4.	<i>Royal Bank of Canada v. Hejna</i> , 2013 ONSC 1719 aff'd 2014 ONCA 306
5.	<i>McCrea (Plaintiff:) Respondent v. Barhan-Jenkins Commission Company (Defendant) Appellant and Raby (Defendant)</i> , 1930 CanLII 652
6.	<i>Alberta Securities Commission v. Hennig</i> , 2021 ABCA 411
7.	<i>Rex v. McManus</i> , [1924] 3 DLR 297, 1923 CanLII 441
8.	<i>JBuck and Sons v. Resource Land Fund V, LP</i> , 2023 ABKB 308
9.	<i>McDonald v. Sproule Management GP Limited</i> , 2023 ABKB 587
10.	<i>International Longshore & Warehouse Union Local 502 v. Ford</i> , 2014 BCSC 65
11.	<i>Wilson v. Bobbie</i> , 2006 ABQB 22
12.	<i>Lepine v. Sherwood Park Dodge Chrysler Jeep Ltd.</i> , 2018 ABPC 12
13.	<i>Kowal v. Sun Star Energy Inc</i> , 2020 ABQB 244
14.	<i>Kelemen v. El-Homeira</i> , 1999 ABCA 315
15.	<i>Ontario v. Madan</i> , 2023 ONCA 18
16.	<i>Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd.</i> 2002 SCC 19
17.	<i>La Trace v. Warkentin Building Movers</i> , 2025 ABKB 412
18.	<i>Liberty Oil & Gas Ltd.(Companies' Creditors Arrangement Act)</i> , 2002 ABQB 949
19.	<i>Montreal (City) v. Deloitte Restructuring Inc.</i> , 2021 SCC 53
20.	<i>Poonian v. British Columbia (Securities Commission)</i> , 2024 SCC 28

TAB	LEGISLATION
21.	<i>Canada Evidence Act</i> , R.S.C., 1985, c. C-5
22.	<i>Alberta Rules of Court</i> , Alta Reg 124/2010, vol 1
23.	<i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36

TAB 1

In the Court of Appeal of Alberta

Citation: Weir-Jones Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA 49

Date: 20190206

Docket: 1703-0218-AC

Registry: Edmonton

Between:

Weir-Jones Technical Services Incorporated

Appellant
(Respondent/Plaintiff)

- and -

Purolator Courier Ltd., Purolator Inc. and Purolator Freight

Respondents
(Applicants/Defendants)

The Court:

**The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Jo'Anne Strekaf**

**Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Chief Justice Fraser
Concurred in by the Honourable Mr. Justice Watson
Concurred in by the Honourable Madam Justice Strekaf**

**Reasons for Judgment Reserved of the Honourable Mr. Justice Wakeling
Concurring in the Result**

Appeal from the Judgment by
The Honourable Madam Justice D.L. Shelley
Dated the 10th day of August, 2017
Filed the 19th day of September, 2017
(2017 ABQB 491, Docket: 1114 00276)

**Reasons for Judgment Reserved
of the Honourable Mr. Justice Slatter**

[1] The appellant appeals the summary dismissal of its claim because it was not brought within the limitation period: *Weir-Jones Technical Services Inc. v Purolator Courier Ltd.*, 2017 ABQB 491.

Facts

[2] The appellant and the respondents had a contractual relationship under which the appellant would transport packages on behalf of the respondents. The contractual arrangement was comprised of a Collective Agreement, an Owner/Operator Contract, and a Standards of Performance Contract. The appellant argues that these written contracts were supplemented by a verbal contract including other matters such as the provision of a trailer that would be used to transport packages. The contractual arrangement was terminated by the appellant in August, 2009.

[3] In November 2008 and January 2009 the Union filed grievances on behalf of the principals of the appellant relating to claims for compensation, unpaid invoices, and other matters. Those grievances went to arbitration in September 2015, following proceedings before the Canada Industrial Relations Board. The grievances were settled on October 2, 2015.

[4] The corporate appellant takes the position that some of its allegations of breach of contract were not covered by the collective agreement or the arbitration. It commenced this action on July 22, 2011 claiming damages. The respondents brought an application to dismiss the claim based on the expiration of the limitation period. The appellant responds that the limitation period had not expired, and in any event there was a standstill agreement in place.

[5] The chambers judge concluded at para. 37 that the appellant was aware of the alleged breaches of contract more than two years before July 22, 2011. The appellant had alleged those breaches in communications with the respondents, and had sought legal advice. Even though there was some uncertainty as to which claims fell outside the arbitration process, the appellant had knowledge that some of the claims warranted a proceeding for a remedial order. Ultimately, the action was actually commenced even before the conclusion of the arbitration proceedings in which the scope of the claims encompassed by that proceeding was established.

[6] The chambers judge found that there was no standstill agreement in place. The sincere belief of the principal of the appellant that the limitation period only started on the date of termination of the contract, and was extended by settlement discussions, was an unfortunate error of law. The parties were engaged in the normal efforts to resolve the dispute, and nothing that was done amounted to an express or implied representation that the limitation period would

not be relied upon. Further, s. 7 and s. 9 of the *Limitations Act*, RSA 2000, c. L-12 required that any extension be in writing.

[7] As a result, the chambers judge concluded that there was no merit to the claim, and it was summarily dismissed.

Issues and Standards of Review

[8] The appellant raises seven grounds of appeal, but they can be grouped as follows:

- a) the chambers judge erred in concluding that the limitation period commenced prior to the termination of the contract on August 21, 2009;
- b) the limitation period was effectively extended by the uncertainty over whether the arbitration proceedings afforded a venue for resolution of the dispute; and
- c) the limitation period was suspended or waived during the period of negotiations.

The first and second issues raise questions of law as to the proper interpretation of the limitations legislation, and mixed questions of fact and law as to the application of that law to the facts. The third issue challenges the fact findings of the chambers judge.

[9] The standards of review are summarized in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235:

- a) conclusions on issues of law are reviewed for correctness: *Housen* at para. 8,
- b) findings of fact, including inferences drawn from the facts, are reviewed for palpable and overriding error: *Housen* at paras. 10, 23; *H.L. v Canada (Attorney General)*, 2005 SCC 25 at para. 74, [2005] 1 SCR 401, and
- c) findings on questions of mixed fact and law call for a “higher standard” of review, because “matters of mixed law and fact fall along a spectrum of particularity”: *Housen* at paras. 28, 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: *Housen* at paras. 33, 36.

The standard of review for findings of fact and for inferences drawn from the facts is the same even when the judge heard no oral evidence: *Housen* at paras. 19, 24-25; *Attila Dogan Construction and Installation Co. v AMEC Americas Ltd*, 2015 ABCA 406 at para. 9, 609 AR 313.

[10] The statement of the test for summary dismissal, and the interpretation of the applicable limitations statute and the *Rules of Court*, are questions of law which are reviewed for correctness. The findings of fact underlying the summary dismissal are entitled to deference. The chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are all entitled to deference: **Hryniak v Mauldin**, 2014 SCC 7 at paras. 81-4, [2014] 1 SCR 87; **Amack v AW Holdings Corp.**, 2015 ABCA 147 at para. 27, 24 Alta LR (6th) 44, 602 AR 62.

The Test for Summary Dismissal

[11] The *Rules of Court* provide for the summary disposition of claims:

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

- (a) there is no defence to a claim or part of it;
- (b) there is no merit to a claim or part of it;
- (c) the only real issue is the amount to be awarded.

The key issue is the approach to be taken in determining the absence of a defence to, or “merit” in a claim.

[12] A rift has recently emerged in the case law discussing the test for summary judgment in Alberta, and in particular the standard of proof that is required for summary judgment. The divergence can be illustrated by comparing **Can v Calgary Police Service**, 2014 ABCA 322, 584 AR 147 with **Stefanyk v Sobeys Capital Incorporated**, 2018 ABCA 125, 67 Alta LR (6th) 215:

Can at para. 20: Summary judgment is appropriate if the nonmoving party's position is without merit. *Alberta Rules of Court*, r. 7.3. “A party's position is without merit if the facts and law make the moving party's position unassailable ... A party's position is unassailable if it is so compelling that the likelihood of success is very high”. *Beier v. Proper Cat Construction Ltd.*, 564 A.R. 357, 374 (Q.B. 2013). Mr. Can's claims are without merit. Justice Bensler's decision was correct and hence, reasonable.

Stefanyk at para. 17: Therefore, in this appeal the issue is not whether the appellant's position is “unassailable”. The first question is whether the record is sufficient to decide if the appellant is liable for the plaintiff's injuries. There are no material facts in dispute, no overwhelming issues of credibility, and the court is able to apply the law to the facts. It is unlikely that the cost and expense of a

trial is justified because of an expectation of a significantly better record. In this case summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result, and therefore it is an appropriate procedure. The ultimate issue is whether the appellant has proven on a balance of probabilities that it is not liable for the plaintiff's injuries.

This appeal and the companion appeal in *Brookfield Residential (Alberta) LP v Imperial Oil Limited*, 2019 ABCA 35 were set down to settle the law.

[13] What is the source of this jurisprudential divergence? The short answer is that there has been a paradigm shift in the approach to summary judgment since the decision in *Hryniak v Mauldin* in 2014. Uncertainty has arisen from the interpretation and application of the new principles governing summary judgment.

[14] Prior to the decision in *Hryniak v Mauldin* the trial was seen as the default procedure for resolving disputes. There was a resistance to using summary judgment, because it was seen as a procedural “short cut” that might compromise the substantive and procedural rights of the resisting party. As a result, while the basic test for summary judgment was whether there was a “genuine issue requiring a trial”, the case law set a very high standard of proof before summary judgment was permitted. The case law was full of phraseology such as “plain and obvious”, “bar to summary judgment is high”, “clearest of cases”, “beyond doubt”, “obvious”, “unassailable”, “incontrovertible”, “so compelling that the likelihood of success is high”, “clear and unanswerable case”, “bound to fail”, and the like.

[15] In *Hryniak v Mauldin* the Supreme Court of Canada called for a “shift in culture” with respect to the resolution of litigation. Reliance on “the conventional trial no longer reflects the modern reality and needs to be re-adjusted” in favour of more proportionate, timely and affordable procedures. Summary judgment procedures should increasingly be used, and the previous presumption of referring all matters to trial should end:

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

24 However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. The cost and delay associated with the traditional process means that . . . the trial process denies ordinary people the opportunity to have adjudication. . . . (emphasis in original)

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

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

This last passage in *Hryniak v Mauldin* noted that every province (except Québec) has a summary judgment procedure, with no indication that the new “shift in culture” applied only in Ontario.

[16] The new approach to summary adjudication was based on the principle of “proportionality” in civil procedure, which is a principle underlying the Alberta *Rules of Court*. The new approach to the disposition of litigation was therefore quickly adopted in Alberta: *Windsor v Canadian Pacific Railway Ltd.*, 2014 ABCA 108 at para. 14, 94 Alta LR (5th) 301, 572 AR 317; B. Billingsley, *Hryniak v Mauldin Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials* (2017), 55 Alta Law Rev 1 at p. 13. Like Ontario’s R. 20, Alberta’s R. 6.11(1) and 7.3 specifically enable fact finding in chambers applications, including (with permission) by hearing oral testimony.

[17] The Alberta *Rules of Court* provide for two types of trial: “summary trials”, and what might be called standard trials. The primary difference between the two is that standard trials presumptively proceed based on oral evidence (R. 8.17), whereas summary trials streamline the evidentiary process. In summary trials, affidavits are common, expert witnesses are not always called, and business records and other documents are introduced without “proof in solemn form”.

[18] Despite the similarity in the names, there is a fundamental difference between “summary judgment” and “summary trial”. Summary disposition is a way of resolving disputes without a trial; a summary trial is a trial: *Windsor v Canadian Pacific Railway* at para. 14. The distinction was noted in *Hryniak v Mauldin* (a summary judgment case) which contrasted (at paras. 73, 77) summary disposition with summary trials and streamlined trials (Ontario R. 76.02 and 76.12).

[19] Summary judgment is available before or at any time during the pretrial process. The advantage of summary disposition is not only that it avoids a trial, in many cases it also avoids

the full expense and delay of those pretrial procedures. A summary trial results in a final adjudication and creates *res judicata*. A successful summary judgment application has the same effect, but an unsuccessful summary judgment application merely means a trial is needed. There is accordingly no “continuum” between summary judgment and summary trial. They are distinct processes. If summary judgment is not available under the test, the dispute must go to trial (summary or standard), but that is a distinct procedure.

[20] Since ***Hryniak v Mauldin*** the presumption that most disputes could or should “go to trial” is seen as being unrealistic. The parties’ resources often do not allow a trial on every issue. Indeed, our civil justice system would be deficient if it could not resolve most claims without a trial. Trials are too expensive for many litigants, and disproportionate for many disputes. Seeing a trial as the default procedure is therefore not realistic; the expense of trial may cause some plaintiffs to “simply give up on justice”: ***Hryniak v. Mauldin*** at para. 25. We have to strive for a “fair and just process” recognizing that “alternative models of adjudication are no less legitimate than the conventional trial”: ***Hryniak v. Mauldin*** at para. 27.

[21] ***Hryniak v Mauldin*** at para. 49 sets out a three part test for when summary judgment is an appropriate procedure:

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

This outline of the procedural approach to summary judgment encompasses a number of points. To enable a “fair and just summary determination” the record before the court and the issues must:

(a) *Allow the judge to make the necessary findings of fact.* An important thing to observe about this part of the test is that it assumes the summary judgment judge (or Master) is able to make findings of fact. The judge is entitled, where possible, to make those findings from the record and draw the necessary inferences. The parameters on fact finding are discussed, *infra*, para. 38. Summary judgment is not limited to cases where the facts are not in dispute. If the summary judgment judge is not able to make the necessary findings of fact, that is an indication that there is a “genuine issue requiring a trial”. This issue is discussed, *infra*, paras. 27ff.

(b) *Allow the judge to apply the law to the facts.* There are cases where the facts are not seriously in dispute, and the real question is how the law applies to those facts. Those cases are ideally suited for summary judgment: ***Tottrup v Clearwater (Municipal District No. 99)***, 2006 ABCA 380 at para. 11, 68 Alta LR (4th) 237, 401 AR 88. If the

record allows the judge to make the necessary findings of fact (as contemplated by the first part of the test), applying the law to those facts essentially comes down to a question of law. Cases like this one, based on the expiration of the limitation period, often fall into this category, as do those that turn on the interpretation of documents.

(c) Assuming the first two parts of the test are met, *summary disposition must be a proportionate, more expeditious and less expensive means to achieve a just result*. This third criterion is a final check, to ensure that the use of a summary judgment procedure (rather than a trial) will not cause any procedural or substantive injustice to either party. Summary judgment will almost always be “more expeditious and less expensive” than a trial. In the end, if the judge finds that summary adjudication might be possible, but might not “achieve a just result” there is a discretion to send the matter to trial. This discretion, however, should not be used as a pretext to avoid resolving the dispute when possible.

These foundational criteria set the procedural framework of the modern law of summary dismissal. They set the procedure for determining whether there is “no merit” or “no defence” to the claim under R. 7.3.

[22] What then is the source of the rift in the case law respecting the test for summary disposition? Part of it may simply be that old habits die hard. Some of the stern vocabulary used before *Hryniak v Mauldin* continued to be used after it was decided, including by this Court. Sometimes this may have been a failure to fully embrace the “shift in culture” called for. Sometimes it was merely a shorthand for saying that there was a “genuine issue requiring a trial”. Sometimes it may have been an unfocused way of saying that on the particular record, given the nature of the issues, summary judgment would not “achieve a just result”. Sometimes this conclusory wording was used without regard to whether it is consistent with the modern principles of summary judgment.

[23] The result is that it is now possible to find a quote in the case law to support virtually any view of the test to be used in summary judgment. The issue cannot be resolved by seeing which “school of thought” has the most support in the case law. Historical analyses are not determinative given the call for a “shift in culture”. Decisions of the Supreme Court of Canada prevail.

[24] The solution must be to go back to first principles: the principles behind the modern law of summary judgment, the principles behind the modern law of proof, the principles behind the type of record to be used in summary dispositions, and principles of fairness.

I. Principles of Summary Judgment

[25] The procedures underlying summary judgment are established by *Hryniak v Mauldin*, and have already been set out, *supra* paras. 14-16, 20-21. It comes down to whether summary

disposition is possible, considering the record, the evidence, the facts, and the law that must be applied to them. If the record allows the judge to make the necessary findings of fact and apply the law, then the summary procedure should be used unless there is a substantive reason to conclude that summary disposition would not “achieve a just result”. Presuming that summary disposition will always be “unjust” unless it meets some high standard of irrefutability defeats the whole concept of the “culture shift” mandated by *Hryniak v Mauldin*.

[26] The *Hryniak v Mauldin* approach is not in any way anomalous, because it is consistent with the overriding goal of “proportionality” in civil procedure recognized by R. 1.2 of the *Alberta Rules of Court: Burns Bog Conservation Society v Canada (A. G.)*, 2014 FCA 170 at para. 42, 83 CELR (3d) 1. All procedures for resolving civil disputes, including summary dispositions, should be timely, cost-effective, and proportionate to the importance and complexity of the issues.

II. Principles of Proof

[27] The principal difference in the approaches taken by *Can* and *Stefanyk* (which are summarized *supra*, para. 12) relates to the test to be met by the moving party in a summary judgment application. *Can* suggested the moving party’s position must be “unassailable” or so compelling that the likelihood of success was “very high”. *Stefanyk* proposed proof on a balance of probabilities. Neither “test” can simply be read in isolation, detached from the summary judgment context. As noted (*supra*, paras. 17-9) there are fundamental differences between summary judgment, summary trials, and standard trials. Meeting the test for proof of the underlying facts is not a proxy for summary judgment.

[28] There was a time when there were numerous standards of proof used in civil law. The uncertainty and complications created were eliminated by the decision in *F.H. v McDougall*, 2008 SCC 53 at para. 40, [2008] 3 SCR 41 which held that there is only one standard of proof in civil law: proof on a balance of probabilities. That standard was confirmed in *Canada (A. G.) v Fairmont Hotels Inc.*, 2016 SCC 56 at paras. 35-7, [2016] 2 SCR 720. Specifically, “obvious”, “unassailable” and “very high likelihood” are no longer recognized standards of proof in Alberta civil proceedings.

[29] The standard of proof applies only to findings of fact. It does not apply to whether, at the end of the day, it is possible to achieve a fair and just adjudication on a summary basis. As pointed out in *Hryniak v Mauldin* at paras. 81-4, whether summary judgment is appropriate and fair involves an element of judicial discretion, but making the underlying findings of fact is an exercise in weighing the evidence.

[30] Addressing the “standard of proof” is not therefore a stand-alone test for whether summary judgment is possible or appropriate. Proving the factual basis of the application on a balance of probabilities is not in itself sufficient for summary adjudication, but merely one of the steps in determining if there is a genuine issue requiring a trial. Even if the factual record is

proven on a balance of probabilities, the presiding judge must still be sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a trial. **Hryniak v Mauldin** does not contemplate summary adjudication on difficult factual questions, requiring a tough call on contested facts, on the basis that “51% carries the day”: see **Hryniak v Mauldin** at para. 51. Those are cases where the summary disposition judge would usually determine that there is a “genuine issue requiring a trial”, even if the moving party had met the threshold burden of proof.

[31] In Alberta, **Hryniak v Mauldin** must be applied having regard to the specific wording of the Alberta *Rules of Court*. Rule 7.3 uses the expressions “no merit”, “no defence” and “the only real issue is the amount”. The word “no” can in some contexts be taken to mean “a complete absence”, but if that standard of proof was required for summary judgment, summary judgment would never be possible. That standard would appear to be even higher than “incontrovertible” or “unassailable”, and would amount to proof to a certainty, a standard that is rejected even in the criminal law as “unrealistically high”: **R. v Lifchus**, [1997] 3 SCR 320 at para. 31. The search for a shift in culture would become illusory. The word “no” cannot be severed from the phrases “no merit” or “no defence”, and should be viewed not in absolute terms but in the context of there being “no real issue”.

[32] A notable aspect of summary judgment applications is that there is no symmetry of burdens. The party moving for summary judgment must, at the threshold stage, prove the factual elements of its case on a balance of probabilities, and that there is no genuine issue requiring a trial. If the plaintiff is the moving party, it must prove “no defence”. If the defendant is the moving party, it must prove “no merit”. The resisting party need not prove the opposite in order to send the matter to trial. The party resisting summary judgment need only demonstrate that the record, the facts, or the law preclude a fair disposition, or, in other words, that the moving party has failed to establish there is no genuine issue requiring a trial: see para. 35, *infra*.

[33] The threshold burden on the moving party with respect to the factual basis of a summary judgment application is therefore proof on a balance of probabilities. If the moving party cannot meet that standard, summary judgment is simply not available. On the other hand, merely establishing the factual record on a balance of probabilities is not sufficient to obtain summary judgment, because proof of the facts does not determine whether the moving party has also proven that there is no “genuine issue requiring a trial”. Imposing standards like “high likelihood of success”, “obvious”, or “unassailable” is, however, unjustified. A disposition does not have to be “obvious”, “beyond doubt” or “highly likely” to be fair.

[34] The suggestion that there is some intermediate standard of proof that applies to summary dispositions is inconsistent with **Hryniak v Mauldin**, **McDougall** and **Fairmont Hotels**. However, as a part of the overall assessment of whether summary disposition is a suitable “means to achieve a just result”, the presiding judge can consider whether the quality of

the evidence is such that it is fair to conclusively adjudicate the action summarily. Proof of the factual basis of the claim or defence by the moving party at the stage of the *Hryniak v Mauldin* test during which the “judge makes the necessary findings of fact”, does not displace issues of fairness. The chambers judge’s ultimate determination on whether summary resolution is appropriate, or whether there is a genuine issue requiring a trial, must still have regard to the summary nature of the proceedings.

[35] Related to the issue of the “standard of proof”, is the “burden of proof” in summary dispositions, the test for which was confirmed in *Murphy Oil Co. v Predator Corp.*, 2006 ABCA 69 at para. 25, 55 Alta LR (4th) 1, 384 AR 251. The moving party has the burden of establishing that, considering the facts, the record, and the law, it is entitled to summary judgment on the merits of the case, and that there is no genuine issue for trial. The resisting party then has an evidentiary burden of persuading the court that there is a genuine issue requiring a trial, or in other words that the moving party has not met that aspect of its burden. The ultimate burden remains on the moving party to establish that there is no genuine issue requiring a trial, and that a fair and just adjudication is possible on a summary basis. The resisting party can meet its evidentiary burden by challenging the moving party’s entitlement to summary judgment (based on gaps or uncertainties in the facts, the record, or the law, etc.), or by raising a positive defence (such as a limitations defence). A dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial. As noted, *infra* para. 37, the resistance to summary judgment must be grounded in the record, not mere speculation. Sometimes the resisting party can succeed by demonstrating that the complexity of the issues makes the case unsuitable for summary disposition, or in other words that there are genuine issues requiring a trial.

III. Principles Relating to the Record in Summary Dispositions

[36] As noted (*supra*, para. 21(a)), where possible findings of fact can and should be made on a summary disposition application. The law is now clear that the mere presence of some conflicting evidence on the record does not preclude summary disposition. As pointed out in *Hryniak v Mauldin* at para. 48, summary judgment is not limited to cases based on documentary evidence, or where the facts are essentially admitted. It observed at para. 57: “On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute” (emphasis added). The sufficiency of the record will depend on the issues, the source and continuity of the evidence, and other relevant considerations.

[37] Even before *Hryniak v Mauldin* it was established that the parties to a summary disposition application must “put their best foot forward”: *Canada (A.G.) v Lameman*, 2008 SCC 14 at para. 11, [2008] 1 SCR 372. One could not resist summary disposition, or create a “genuine issue requiring a trial” by speculation about what might turn up in the future. *Lameman* stated the principle at para. 19:

19 We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others. (emphasis added)

From this it is clear that the *Hryniak v Mauldin* test is to be applied based on the record actually before the summary disposition judge.

[38] Summary dismissal was resisted in *Sturgeon Lake Indian Band v Canada (A. G.)*, 2017 ABCA 365 at paras. 38-45, 60 Alta LR (6th) 226, leave to appeal refused SCC #37899 (July 5, 2018), based on affidavits containing opinions, hearsay, irrelevant facts said to be in dispute, and statements that were clearly contradicted by the rest of the record. That decision noted:

39 ... Not every conflict in the evidence precludes the chambers judge from drawing inferences from the admitted facts, the undisputed evidence, the conduct of the parties, and the corroborating evidence (such as documents with objective reliability) . . .

40 The mere fact that there might be some conflicting evidence on the record does not mean that a "fair and just adjudication" is not possible ...

The chambers judge can make findings of fact if, viewed overall, the record permits that to be done: *Shefsky v California Gold Mining Inc.*, 2016 ABCA 103 at para. 113, 31 Alta LR (6th) 1, 616 AR 290; *Arndt v Banerji*, 2018 ABCA 176 at para. 42. There are some issues of fact (such as issues of credibility, or conflicts in the evidence on material issues) that are not amenable to summary adjudication, and that are markers of genuine issues requiring a trial. There are also cases where summary disposition is possible because even if the facts asserted by the resisting party were true, they would not support that party's claim: *Arndt v Banerji* at para. 36(b).

[39] Whether it is possible for "the judge to make the necessary findings of fact" is tested based on the actual record, and not on speculation about what type of record might be available at trial. In those cases where there is a "genuine issue requiring a trial", it will be because there is a realistic prospect that a trial will create a better record, but that conclusion must be reached

based on the evidence before the summary disposition judge, not speculation. In this respect, the traditional test of whether there is a “genuine issue requiring a trial” still has utility.

[40] Again, having regard to overall considerations of fairness and the ability “to achieve a just result”, there can be occasions when the “best foot forward” approach is not strictly applied. That may happen, for example, where one party effectively controls all of the records and evidence with respect to the claim: e.g. **Honourable Patrick Burns Memorial Trust (Trustee of) v P. Burns Resources Ltd.**, 2015 ABCA 390 at para. 11, 26 Alta LR (6th) 1, 612 AR 63. In those circumstances, the application for summary determination can be adjourned to permit some pre-trial discovery.

IV. Principles of Fairness

[41] The final principle is a need to ensure an appropriate level of fairness in the procedures used to resolve disputes. Considerations of “fairness” are built into the **Hryniak v Mauldin** test, which specifies that summary disposition must be a suitable “means to achieve a just result”.

[42] Restrictions on summary disposition are sometimes justified on the basis that summary disposition deprives the plaintiff of “the right to go to trial”, or “full access to the civil procedure spectrum”. This is essentially a procedural argument about fairness. There is, however, no right to take an unmeritorious claim to trial, a process described in **Hryniak v Mauldin** at para 28 as “the most painstaking procedure”. All claims are subject to screening at various stages. Claims must disclose a cause of action, or they will be struck: R. 3.68. Plaintiffs must be able to demonstrate sufficient “merit” to avoid summary disposition: R. 7.3. There is no “right” to use the most expensive modality of dispute resolution (i.e., the trial) if these hurdles cannot be overcome: **Trial Lawyers Ass’n of British Columbia v British Columbia (A. G.)**, 2017 BCCA 324 at paras. 21, 56, [2018] 2 WWR 480, leave to appeal refused SCC #37843 (July 26, 2018).

[43] In any event, any “right of the plaintiff to have a trial” is equally offset by the “right of the defendant not to have a trial on an unmeritorious claim”. Fairness is a two-way street. Litigation is expensive and distracting, and the costs awarded to the successful party seldom amount to full indemnity. Cost, delay and inequality of arms may mean that the right to adjudicative fairness, justice, and reliability can actually be hindered by a full trial. A defendant who can show that a claim has “no merit” on a summary disposition application should not have to suffer a trial. As noted, *supra* para. 32, the resisting party does not have to prove its own case at this stage, but only demonstrate that the moving party has failed to show there is no genuine issue requiring a trial.

[44] All of the parties and the court must make efficient use of limited resources:

... the problem of systemic delay is exacerbated by cases like this where a summary judgment motion has been properly brought and a judge refuses to

adjudicate it on its merits. On a summary judgment motion, a judge has the duty to take "a hard look" at the merits of a claim: **Knee v Knee**, 2018 MBCA 20 at para. 33.

As the Court noted in **Hryniak v Mauldin** at paras. 27-8, a fair and just summary dismissal procedure is "... illusory unless it is also accessible - proportionate, timely and affordable", and that summary procedures are "no less legitimate" than trials.

[45] While the law does not have to be beyond doubt before summary judgment can be granted, there are occasions when the law is so unsettled or complex that it is not possible to apply the law to the facts without the benefit of a full trial record: e.g. **Tottrup v Clearwater** at para. 11; **Cardinal v Alberta Motor Association Insurance Co.**, 2018 ABCA 69 at para. 10, 66 Alta LR (6th) 15; **Condominium Corp. No. 0321365 v Cuthbert**, 2016 ABCA 46 at para. 29, 33 Alta LR (6th) 209, 612 AR 284; **Axxess Mortgage Fund Ltd. v 1177620 Alberta Ltd.**, 2018 ABQB 626 at para. 49. Where the case presents complex factual issues, such as those based on highly technical scientific and medical evidence, summary disposition will often be inappropriate. There are other occasions where there will be a genuine issue requiring a trial.

[46] Procedural and substantive fairness must always be a part of the summary disposition process. Considerations of fairness need not be a threshold requirement, nor should they only arise at the conclusion of the application. The chambers judge is entitled to take into consideration the fairness of the process, and its ability to achieve a just result, at all stages. Thus considerations of fairness will always be in the background, including during the fact-finding process, in determining whether the moving party has proven its case on a balance of probabilities, in deciding if there is a genuine issue requiring a trial, and in deciding if, considered overall, summary disposition is a "suitable means to achieve a just result". The ultimate determination of whether summary disposition is appropriate is up to the chambers judge: **Hryniak v Mauldin** at para. 83. As stated in **Hryniak v Mauldin** at para. 50 and **Nelson v Grande Prairie (City)**, 2018 ABQB 537 at para. 47, 75 Alta LR (6th) 36, whether a summary disposition will be fair and just will often come down to whether the chambers judge has a sufficient measure of confidence in the factual record before the court. In practical terms, that level of confidence will not often be reached in close cases.

V. Summary of the Application of the Principles

[47] The proper approach to summary dispositions, based on the **Hryniak v Mauldin** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a “just result”, or there is a genuine issue requiring a trial.

[48] There is no policy reason to cling to the old, strict rules for summary judgment. This can only serve to undermine the shift in culture called for by *Hryniak v Mauldin*. Summary judgment should be used when it is the proportionate, more expeditious and less expensive procedure. It frequently will be. Its usefulness should not be undermined by attaching conclusory and exaggerated criteria like “obvious” or “high likelihood” to it.

[49] In closing, it is helpful to note that the judge who dismisses an application for summary adjudication may still be in a position to advance the litigation. The judge may be able to isolate and identify issues that can be tried separately under R. 7.1. The summary judgment materials may form a suitable platform for a summary trial, as happened in *Vallard Construction Ltd. v Bird Construction*, 2015 ABQB 141, 41 CLR (4th) 51. While serial applications for summary judgment are not to be encouraged, a second application for summary judgment may be appropriate later in the proceedings when the record is clarified and the issues are perhaps narrowed: *Milne v Barnes*, 2013 ABCA 379 at para. 6, 561 AR 256.

The Limitation Period

[50] The *Limitations Act* provides:

3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

There is therefore a three part test, based on a reasonable awareness of the injury, attribution of the injury to the defendant, and a claim warranting a proceeding for a remedial order.

[51] The limitation period for breaches of contract is covered by this provision. Under s. 4(g) of the previous *Limitation of Actions Act*, RSA 1980, c. L-15, the limitation period for breaches of contract started when the “cause of action arose”: ***Fidelity Trust Co. v 98956 Investments Ltd.***, 1988 ABCA 267 at para. 28, 89 AR 151, 61 Alta LR (2d) 193. That occurred at the time of the breach of the contract, regardless of “discoverability” of the claim or any damage. The specific wording of the statute drove that result.

[52] The chambers judge concluded that the same rule still applies under the new *Limitations Act*, citing ***Papaschase Indian Band No. 136 v Canada (Attorney General)***, 2004 ABQB 655 at para 155, 365 AR 1, aff'd ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para. 12, [2008] 1 SCR 372. The breach of contract in ***Papaschase***, however, occurred in the 1880s, and that case was decided under the old legislation. The present *Limitations Act* contains no separate rule for limitation periods for breaches of contract, and they are covered by the same three part test: reasonable awareness of the injury, attribution of the injury to the defendant, and a claim warranting a proceeding. In many cases arising from breach of contract the three part test may in fact be met at the time of the breach of contract, but that is not invariably so.

[53] Since the statute provides the test for the commencement of the limitation period, the alternative starting points proposed by the appellant do not apply. Unless the alternative proposed dates happen to coincide with the test in the *Limitations Act*, the limitation period does not commence on (a) the date of breach, (b) the date the last services are provided under a service contract, (c) the date that economic loss emerges, (d) the date of acceptance of repudiation, or (e) the termination of the contract.

[54] In order to obtain summary dismissal of the claim based on the expiration of the limitation period, the respondents had to show from the record that the injury alleged by the appellant (arising from the alleged breaches of contract) was reasonably known, attributable to the respondents, and sufficiently serious to warrant a proceeding, no later than July 22, 2009. While the chambers judge proceeded on the erroneous assumption that the limitation period started to run at the time of breach, she made the necessary findings of fact as to when the appellant discovered and could reasonably have commenced the action.

[55] The chambers judge found that the breaches alleged by the appellant, the injury that resulted, and the knowledge that the injuries warranted a proceeding were known more than two years before the action was commenced. This is a finding of fact, to which deference must be extended. There is in substance no doubt that the appellant was aware of the claim before July 22, 2009. It acknowledges in para. 2 of its factum: “The appellant states that it first became aware of a claim against the Respondents in February 19, 2009, after obtaining a legal opinion from his legal counsel.” A number of the alleged breaches of contract are mentioned in a memorandum of a telephone conversation of November 1, 2008 (EKE R4-7). The appellant’s letter to the Union dated June 13, 2009 (EKE A10-13) also contains particulars of many elements of the claim. There were other communications that amply support the chambers judge’s conclusion that the breaches were known months before July 22, 2009. The determinative issue is therefore whether there were any circumstances that would, in law, extend the commencement date of the limitation period.

[56] There was some dispute or uncertainty about whether the corporate appellant and its allegations of breach of contract were covered by the collective agreement, and therefore whether it was bound to pursue any claims through the arbitration process. Uncertainty about which claims were covered by the arbitration process does not delay commencement of the limitation period. Reliance on the possible efficacy of other procedures amounts at most to an error of law, which does not have the effect of delaying commencement of the limitation period. Discovery relates to the facts, not the applicable law or any assurance of success: **Templanza v Wolfman**, 2016 ABCA 1 at para. 19, 612 AR 67, leave to appeal refused [2016] 2 SCR xi; **De Shazo v Nations Energy Co.**, 2005 ABCA 241 at para. 31, 48 Alta LR (4th) 25, 367 AR 267.

[57] The appellant indicates that it did not commence a court action for close to three years after it discovered its claim “in part because of the potential for a global settlement of the matters alleged in the Statement of Claim, informally or otherwise, along with the labour

matters.” If the plaintiff fails to seek a “remedial order” within the limitation period because of a mistaken view of the availability of an alternative procedure, the claim will be barred: ***Babcock and Wilcock Canada Ltd. v Agrium Inc.***, 2005 ABCA 82 at para. 16, 39 Alta LR (4th) 197, 363 AR 103.

[58] Section 3(1)(a)(iii) requires knowledge of an injury warranting a proceeding “assuming liability on the part of the defendant”. Discoverability does not require perfect knowledge or certainty that the claim will succeed: ***De Shazo*** at paras. 31-2. The record does not disclose any circumstances that would extend the commencement of the limitation period.

Settlement Negotiations

[59] As noted (*supra*, para. 55) there were various communications between the parties about the alleged breaches of the contract. Some of those communications expressed a willingness to resolve the outstanding issues, and they expressed a preference for avoiding unnecessary legal fees and court costs. Reminders that court remedies were always available if negotiations were unsuccessful tempered those expressions of intention. The respondents requested documentation to support some of the claims, and expressed a willingness to discuss the issues. In the meantime, the grievance and arbitration procedures were unfolding.

[60] The appellant argues that this correspondence amounted to a standstill agreement, under which the respondents agreed that proceedings need not be commenced. Alternatively, they argue that the respondents made representations that estop them from now pleading the *Limitations Act*.

[61] The correspondence in question does not use the word “standstill”, or any synonym. There is no mention of the *Limitations Act*. The chambers judge characterized it at para. 40 as “no more than normal dealings between parties attempting to resolve a claim”. The clear recognition in the correspondence that legal proceedings would follow if negotiations were unsuccessful is inconsistent with any inference that legal rights were being waived. The appellant correctly characterizes the correspondence in its factum as evidence of “an agreement to negotiate rather than litigate”. It does not disclose any agreement to waive legal rights. The chambers judge’s conclusion that there was no standstill agreement, nor any representation that the limitation period would not be relied on, discloses no reviewable error.

[62] The allegation of a standstill agreement does not raise any issue requiring a trial, and there is no prospect of a significantly better record emerging from a trial. The correspondence said to create the standstill agreement or estoppel is on the record. The chambers judge had affidavits from the appellant’s officer setting out his expectations and understandings of the correspondence and the negotiations. Some of his expectations are inconsistent with the correspondence, and others depend on an erroneous view of the legal consequences of the correspondence. His hope that the dispute could be settled by negotiation did not have the effect of extending the limitation period. The chambers judge was entitled to conclude that the

appellant had not proven, on a balance of probabilities, that there was any standstill agreement or estoppel.

Conclusion

[63] In conclusion, the appellant has failed to show any reviewable error in the fact findings of the chambers judge, or the inferences she drew from the record. The incorrect assumption about when the limitation period commences for breach of contract claims did not affect the outcome. The appeal is accordingly dismissed.

Appeal heard on September 7, 2018

Reasons filed at Edmonton, Alberta
this 6th day of February, 2019

Slatter J.A.

I concur: _____
Fraser C.J.A.

I concur: _____
Watson J.A.

I concur: _____
Authorized to sign for: Strekaf J.A.

**Judgment Reserved of the Honourable Mr. Justice Wakeling
Concurring in the Result**

I. Introduction

[64] There are two conflicting summary judgment tests that have appealed to panels of this Court in the post *Hryniak v. Mauldin*¹ era.

[65] One states that summary judgment may be granted only if the disparity between the strength of the moving and nonmoving parties' positions is so marked that the likelihood the moving party's position will ultimately prevail is very high – the outcome is obvious.² This is

¹ 2014 SCC 7, [2014] 1 S.C.R. 87. The Supreme Court released this judgment on January 23, 2014.

² 898294 *Alberta Ltd. v. Riverside Quays Ltd. Partnership*, 2018 ABCA 281, ¶ 12 (“Summary judgment is reserved for the resolution of disputes where the outcome of the contest is obvious Is the ‘moving party’s position ... unassailable or so compelling that its likelihood of success is very high and the nonmoving party’s likelihood of success very low?’”); *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶ 2, 20 C.P.C. 8th 43, 46-47 (“Summary judgment may be appropriate ‘if the moving party’s position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party’s likelihood of success is very low’. This is an onerous standard and rightly so”); *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153, ¶ 15, 17 C.P.C. 8th 252, 255 (“Summary dismissal is appropriate ‘if the moving party’s position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party’s likelihood of success is very low’”); *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160, ¶ 2, 100 C.P.C. 7th 52, 61 (“Rule 7.3 of the *Alberta Rules of Court* allows a court to summarily dismiss an action that is without merit. A nonmoving party’s position is without merit if the moving party’s position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party’s likelihood of success is very low”); *Talisman Energy Inc. v. Questerre Energy Corp.*, 2017 ABCA 218, ¶ 18, 57 Alta. L.R. 6th 19, 29 (“the court must ask ‘whether there is any issue of merit that genuinely requires a trial or conversely, whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily’”); *Baim v. North Country Catering Ltd.*, 2017 ABCA 206, ¶ 12 (“The test for summary judgment is whether the claim or defence is so compelling that the likelihood it will succeed is very high, such that it should be determined summarily”); *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*, 2016 ABCA 331, ¶ 10 (“The case management judge correctly stated the legal test for summary dismissal as found in this Court’s recent decisions in *Access Mortgage Corp. (2004) Limited v. Arres Capital Inc. ...* and 776826 *Alberta Ltd. v. Ostrowercha*”); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46, ¶ 27, 612 A.R. 284, 289 (“the court must ask ‘whether there is any issue of merit that genuinely requires a trial or, conversely, whether the claim or defense is so compelling that the likelihood of it will succeed is very high such that it should be determined summarily’”); *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12, ¶ 19 (the Court adopted the test set out in *W.P. v. Alberta*); 776826 *Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49, ¶ 13, 593 A.R. 391, 395 (the Court adopted the test set out in *W.P. v. Alberta*); *W.P. v. Alberta*, 2014 ABCA 404, ¶ 26, 378 D.L.R. 4th 629, 642 (“The question is whether there is in fact any issue of ‘merit’ that genuinely requires a trial, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily”) (emphasis in original); *Stout v. Track*, 2015 ABCA 10, ¶¶ 48 & 50, 62 C.P.C. 7th 260, 279 per Wakeling, J.A. (“Rule 7.3(1)(b) of the *Alberta Rules of Court* allows a court to dismiss a plaintiff’s claim if it has no merit. The nonmoving party’s position is without merit if the

likelihood the moving party's position will prevail is very high. The likelihood the moving party's position will prevail is very high if the comparative strengths of the moving and nonmoving party's positions are so disparate that the likelihood the moving party's position will prevail is many times greater than the likelihood that the nonmoving party's position will carry the day. ... [T]he comparative strengths of the moving and nonmoving parties' positions need not be so disparate that the nonmoving party's prospects of success must be close to zero before summary judgment may be granted"); *Access Mortgage Corp. (2004) v. Arres Capital Inc.*, 2014 ABCA 280, ¶¶ 45 & 46, 584 A.R. 68, 78 ("Rule 7.3 of the new *Alberta Rules of Court* allows a court to grant summary judgment to a moving party if the nonmoving party's position is without merit. A party's position is without merit if the facts and the law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high"); *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 20, 315 C.C.C. 3d 337, 357 per Wakeling, J.A. ("Summary judgment is appropriate if the nonmoving party's position is without merit. ... 'A party's position is without merit if the facts and law make the moving party's position unassailable A party's position is unassailable if it is so compelling that the likelihood of success is very high'"); *Acess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626, ¶ 60 ("The questions is whether, on the record, the probative value of the non-moving party's evidence is so low that it does not preclude the inferences sought by the moving party. In that sense, the non-moving party's likelihood of success must be 'very low'"); *Quinney v. 1075398 Alberta Ltd.*, 2015 ABQB 452, ¶ 39, 24 Alta. L.R. 6th 202, 214 ("With respect to Rule 7.3(1), a party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. To be unassailable, the position must be so compelling that the likelihood of success is very high"); *Rohit Land Inc. v. Cambrian Strathcona Properties Corp.*, 2015 ABQB 375, ¶ 48, [2015] 12 W.W.R. 728, 744 (the Court adopted the *Beier* principles); *Mackey v. Squair*, 2015 ABQB 329, ¶ 22, 617 A.R. 259, 264 ("A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. In this regard, 'unassailable' means if it is so compelling that the likelihood of success is very high"); *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120, ¶ 51, 40 C.L.R. 4th 187, 208-09 (the Court applied the principles set out in *Access Mortgage Corp. (2004)* and *Beier v. Proper Cat Construction*); *Nipshank v. Trimble*, 2014 ABQB 120, ¶ 14, 8 Alta. L.R. 6th 152, 158-59 ("the preferable formulation I prefer is stated in *Beier v. Proper Cat Construction* ... and in *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* ... which requires the Court to consider whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high. The reason this is preferable is that it not only states the high threshold which an applicant must meet for obtaining summary judgment, but also contains within it the rationale for granting summary judgment and depriving the respondent of full access to all litigation tools"); *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 29, 587 A.R. 16, 26 ("The formulation I [prefer is] that stated in *Beier v. Proper Cat Construction*... and in *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* ..., which requires the Court to consider whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high"); *Dequire v. Burnett*, 2013 ABQB 488, ¶ 22, 36 R.P.R. 5th 60, 69 ("Justice Wakeling's formulation of the test for obtaining summary judgment – that is, whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high – not only expresses the high threshold set by the Court of Appeal in *Murphy Oil and Boudreault*; it also contains within it the rationale for granting summary judgment and thereby depriving a litigant of full access to all litigation tools"); *Hari v. Bariana*, 2015 ABQB 605, ¶ 80 (Master) ("The test for summary judgment is whether the applicant's position is 'unassailable', but that does not mean that there is 'no reasonable doubt' about its success. A party's position is unassailable if it is so compelling that the likelihood of success is very high") & *Rai v. 1294477 Alberta Ltd.*, 2015 ABQB 349, ¶ 22 & 36, 618 A.R. 220, 225 & 227 (Master) ("There is no doubt that a high degree of certainty is required to end a case early. ... The Defendant's position is unassailable on the record before the Court. This case does not merit further consumption of judicial resources").

the standard in force throughout the common law world.³ It has been utilized in Alberta⁴ and other provinces⁵ long before the Supreme Court released *Hryniak v. Mauldin*.

³ E.g., *Chief Constable of Greater Manchester Police v. Carroll*, [2017] EWCA Civ 1992, ¶ 60 per Sir Terence Etherton M.R. (“It cannot be said that the claim is so weak or inherently implausible that it could be ... dismissed on summary judgment”); *Rich v. CGU Insurance Ltd.*, [2005] HCA 16, ¶ 18, 214 A.L.R. 370, 375 per Gleeson C.J. & McHugh & Gummow, J.J. (“issues ... are to be determined in a summary way only in the clearest of cases”); *Palermo v. National Australia Bank Ltd.*, [2017] QCA 321, ¶ 70 (“summary judgment for a plaintiff should be granted where it is clear that any available defence has no prospects of success ... or because a defence would be bound to fail”); *Thompson v. Turner Hopkins*, [2018] NZCA 197, ¶ 8 (“Where a defendant applies for summary judgment, a defendant has to show that the plaintiff cannot succeed”); *Bigyard Holdings Ltd. (in receivership) v. Tasmandairy Ltd.*, [2017] NZHC 1918, ¶ 45 (“The Court must be left without any real doubt or uncertainty”); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (“In essence ... the inquiry ... is ... whether the evidence presents a sufficient disagreement to require submissions to a jury or whether it is so one-sided that one party must prevail as a matter of law”); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (“[The nonmoving party] must do more than simply show that there is some metaphysical doubt as to the material facts. ... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is ‘no genuine issue for trial’”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (“the burden on the moving party may be discharged by ... pointing out to the district court ... that there is an absence of evidence to support the nonmoving party’s case”) & *Dunn v. Menard, Inc.*, 880 F. 3d 899, 905 (7th Cir. 2018) (“Summary judgment is appropriate if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. ... A genuine dispute of material fact exists if ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party’”).

⁴ *Canada v. Lameman*, 2008 SCC 14, ¶ 10, [2008] 1 S.C.R. 372, 378 (“The summary judgment rule ... prevents claims or defences that have no chance of success from proceeding to trial”); *Another Look Ventures Inc. v. 642157 Alberta Ltd.*, 2012 ABCA 253, ¶ 8 (“[summary judgment may be granted if] it is plain and obvious that the action cannot succeed”); *Enokhok Development Corp. v. Alberta Treasury Branches*, 2011 ABCA 322, ¶ 12, 68 Alta. L.R. 5th 126, 131 (“Summary judgment should only be granted if the matter is factually and legally beyond doubt”); *Eng v. Eng*, 2010 ABCA 19, ¶ 5, [2010] 6 W.W.R. 29, 31 (“It must be beyond doubt that no genuine issue for trial exists”); *Kristal Inc. v. Nicholl & Akers*, 2007 ABCA 162, ¶ 7, 41 C.P.C. 6th 381, 385 (“The [summary judgment] test is whether it is plain and obvious that the action cannot succeed”); *Saxton v. Credit Union Deposit Guarantee Corp.*, 2006 ABCA 175, ¶ 18, 384 A.R. 309, 314 (“To grant ... [a summary judgment] application a court must be satisfied that it is ‘plain and obvious’ or ‘beyond a doubt’ the action will not succeed”); *Stoddard v. Montague*, 2006 ABCA 109, ¶ 13, 412 A.R. 88, 91 (“In applications for summary dismissal, the moving party has the onus of filing evidence to demonstrate the claims against him or her are hopeless and beyond doubt”); *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69, ¶ 24, 384 A.R. 251, 257 (“Summary judgment ... will only be granted where there is no genuine issue for trial. It must be ‘plain and obvious’ that the action cannot succeed. ... Other formulations of the burden to be met by a moving party include the ‘beyond doubt’ standard”); *De Shazo v. Nations Energy Co.*, 2005 ABCA 241, ¶ 19, 256 D.L.R. 4th 502, 508 (“When faced with a summary judgment application of this type the court must ascertain whether there are undisputed facts that necessarily lead to the conclusion that it is plain and obvious that the plaintiff’s claim is statute barred”); *Prefontaine v. Veale*, 2003 ABCA 367, ¶ 9, [2004] 6 W.W.R. 472, 478 (“The test for summary judgment in favour of a defendant under Rule 159 ... is whether ‘it is plain and obvious that the action cannot succeed’”); *Trustee of Pioneer Exploration Inc. v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298, ¶ 19, 27 Alta. L.R. 4th 62, 65 (“It must be beyond doubt that no genuine issue for trial exists”); *Wilson v. City of Medicine Hat*, 2000 ABCA 247, ¶ 54, 87 Alta. L.R. 3d 25, 41 (“the suits... should be barred. ... [T]here would be an unanswerable defence for purposes of R. 159”); *Boudreault v. Barrett*, 1998 ABCA 232, ¶ 2, 219 A.R. 67, 69 (“In our view, the action could not succeed if it proceeded to trial and was properly dismissed under Rule 159”); *Wavel Ventures Corp. v. Constantini*, 1996 ABCA 415, ¶ 35, 46

Alta. L.R. 3d 292, 305 (“Summary judgment cannot be granted unless the issue is beyond doubt”)’ *Mellon v. Gore Mutual Insurance Co.*, 1995 ABCA 340, ¶ 3, 174 A.R. 200, 201 (“[summary judgment may be granted if it is] manifestly clear or beyond a reasonable doubt that there is not a triable issue”); *Mr. Submarine Ltd. v. Aristotelis Holdings Ltd.*, 1993 ABCA 153, ¶ 3, 102 D.L.R. 4th 764, 765 ([summary judgment is unsafe unless] “all substantial doubt [about the nonmoving party’s care] has been removed”); *Zebroski v. Jehovah’s Witnesses*, 1998 ABCA 256, ¶ 5, 87 A.R. 229, 232 (“summary judgment is available to a defendant, where the material clearly demonstrates that the action is bound to fail”); *German v. Major*, 1985 ABCA 176, ¶ 37, 62 A.R. 2, 9 (“It is impossible for German to win this suit. ... It is, in short, plain and obvious that German’s action will not succeed”); *Pacific Western Airlines Ltd. v. Gauthier*, 2 Alta. L.R. 2d 52, 54 (Alta. Sup. Ct. App. Div. 1977) (“[the summary judgment test is whether] the question at issue is beyond doubt”); *Scandinavian Bank v. Shuman*, 37 D.L.R. 419, 421 (Alta. Sup. Ct. App. Div. 1917) (“[summary judgment is appropriate only if] it was manifested that [the nonmoving party] had no defence in law to the action”); *R.B. New Co. Ltd. v. 1331440 Alberta Ltd.*, 2013 ABQB 487, ¶ 23, 8 Alta. L.R. 6th 40, 47-48 (“in essence, the test for summary judgment – whether for the plaintiff or defendant – remains the same: the applicant must prove that the party opposite has ‘no chances of success’: *Lameman*”); *O’Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, ¶ 38, 18 B.L.R. 5th 73, 91 (the Court adopted the *Beier* principles); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 61, 35 R.P.R. 5th 105, 129 (“Rule 7.3 of the new *Alberta Rules of Court* allows a court to grant summary judgment to a moving party if the nonmoving party’s position is without merit. A party’s position is without merit if the facts and law make the moving party’s position unassailable and entitle it to the relief it seeks. A party’s position is unassailable if it is so compelling that the likelihood of success is very high”); *Jackson v. Canadian National Railway*, 2012 ABQB 652, ¶ 112, [2013] 4 W.W.R. 311, 360-61 (the Court held that *Canada v. Lameman* sets out the applicable summary judgment test); *Airco Aircraft Charters Ltd. v. Edmonton Regional Airports Authority*, 2010 ABQB 397, ¶ 23, 28 Alta. L.R. 5th 324, 333 (“If a defendant applies for summary judgment, it must be plain and obvious, clear or beyond doubt that the action should be summarily dismissed”); *Donaldson v. Farrell*, 2011 ABQB 11, ¶ 33 (“The Applicants have other remedies available to them such as summary dismissal proceedings if they consider that some of Ms. Donaldson’s claims are hopeless”); *Papaschase Indian Band No. 136 v. Canada*, 2004 ABQB 655, ¶¶ 58 & 157, [2005] 8 W.W.R. 442, 477 & 514 (“All of these factors can be considered in deciding if the case is ‘hopeless’ or if there is a ‘genuine’ issue for trial. ... To use the language of the cases, the claim is bound to fail, has no prospect of success, and does not raise any genuine issue for trial”); *Kary Investment Corp. v. Tremblay*, 2003 ABQB 315, ¶ 21 (“summary judgment may only be granted where it is demonstrated that the outcome is virtually certain”); *Dreco Energy Services Ltd. v. Wenzel*, 2003 ABQB 1067, ¶ 41, 344 A.R. 299, 309 (“The bar is high in an application for summary dismissal of a claim”); *Tanar Industries Ltd. v. Outokumpu Ecoenergy Inc.*, 1999 ABQB 597, ¶ 26, [1999] 11 W.W.R. 146, 153 (a moving party must “clearly demonstrate that the Plaintiff’s action is bound to fail”); *Union of India v. Bumper Development Corp.*, 171 A.R. 166, 180 (Q.B. 1995) (“on an application for summary judgment, the parties are entitled to an answer if in the opinion of the court the matter is beyond doubt”); *Royal Bank of Canada v. Starko*, 9 Alta. L.R. 3d 339, 342 (Q.B. 1993) (“To obtain summary judgment pursuant to R. 159 ... the Applicant must show that the question at issue is beyond doubt”); *Investors Group Trust Co. v. Royal View Apartments Ltd.*, 70 A.R. 41, 47-48 (Q.B. 1986) (“summary judgment should not be granted ... unless the question is beyond doubt and there is no reasonable cause of action”); *Allied-Signal Inc. v. Dome Petroleum Ltd.*, 122 A.R. 321, 329 (“A defendant must show more than a strong likelihood that he will succeed. To justify deciding the matter without a trial, the pleadings and evidence on the motion must show that the claim has no reasonable prospect of success”); *Wong v. Lantic Inc.*, 2012 ABQB 716, ¶ 48, [2013] 4 W.W.R. 578, 587 (Master) (“Before granting summary judgment, the court must be satisfied that it is plain and obvious that the action cannot succeed”); *Rencor Developments Inc. v. First Capital Realty Inc.*, 2009 ABQB 262, ¶ 8 (Master) (“An applicant for summary judgment or dismissal must pass a high threshold The applicant must establish that it is ‘plain and obvious’ or ‘beyond a doubt’ that the action will not succeed”); *Pointe of View Developments Inc. v. Cannon & McDonald Ltd.*, 2008 ABQB 713, ¶ 21, 77 C.L.R. 3d 213, 218 (Master) (the Court applied the *Lameman* test); *Tucson Properties Ltd. v. Sentry Resources Ltd.*, 22 Alta. L.R. 2d 44, 47 (Master 1982) (summary judgment may be granted if the ultimate disposition of the action is “beyond all doubt”); *Barrowman v. Ranchland Asphalt*

[66] The only difference between the different standards is the degree of disparate strength necessary. Some courts have insisted that the nonmoving party's position be completely without merit so that the nonmoving party could not possibly succeed.⁶ This means that the likelihood the moving party will succeed must approach 100 percent and the likelihood the nonmoving party will prevail must be around zero percent. Using this measure increases the degree of disparity to the maximum point and reduces considerably the utility of the summary judgment process. Others have granted summary judgment even though the nonmoving party's position has some merit. This test reduces the requisite degree of disparity and increases the utility of the summary judgment process. It is enough if the likelihood that the moving party's

Services Ltd., 29 A.R. 306, 335-36 (Master 1981) ("The decisions do indicate that summary judgment should not be granted unless the question at issue is beyond doubt") & *Jason Development Corp. v. Robertoria Properties Ltd.*, 42 A.R. 369, 371 (Master 1980) ("summary judgment should not be granted 'unless the question at issue is beyond doubt'").

⁵ *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221, ¶ 50 ("I cannot conclude that B & L's claim is bound to fail"); *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.*, 55 B.C.L.R. 137, 139 (C.A. 1984) ("if the defendant is bound to lose, the [summary judgment] application should be granted"); *Green v. Tram*, 2015 MBCA 8, ¶ 2 ("The motions judge concluded that ... the appellant's claims ... must fail"); *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, ¶ 59 ("In my view, given the Release and Indemnity, Mr. Upham's claim against Shannex for unjust enrichment has no real chance of success. ... Summary judgment should issue to dismiss Mr. Upham's direct claims against Shannex"); *059143 N.B. Inc. v. 656340 N.B. Inc.*, 2014 NBCA 46, ¶ 10 ("[to grant summary judgment] the moving party's case must be unanswerable"); *Forsythe v. Furlotte*, 2016 NBCA 6, ¶ 24 ("The summary judgment test ... is a stringent one and is designed to determine whether there is any reason to doubt the outcome of a matter ... because the moving party's case is 'unanswerable'"); *Schram v. Nunavut*, 2014 NBCA 53, ¶ 8 ("Before granting summary judgment, the motion judge had to determine on the record ... that the outcome was a foregone conclusion"); *Royal Bank of Canada v. MJL Enterprises Inc.*, 2017 PECA 10, ¶ 9 ("Rule 20.04(1) allows a court, on motion, to grant summary judgment if the court is satisfied there is no genuine issue requiring a trial") & *Burns Bog Conservation Society v. Canada*, 2014 FCA 170, ¶ 43 ("this is a clear case where the appellant's claim must be weeded out because it is bound to fail").

⁶ E.g., *Canada v. Lameman*, 2008 SCC 14, ¶ 10, [2008] 1 S.C.R. 372, 378 ("The summary judgment rule ... prevents claims or defences that have no chance of success from proceeding to trial"); *Enokhok Development Corp. v. Alberta Treasury Branches*, 2011 ABCA 322, ¶ 12, 68 Alta. L.R. 5th 126, 131 ("Summary judgment should only be granted if the matter is factually and legally beyond doubt"); *Stoddard v. Montague*, 2006 ABCA 109, ¶ 13, 412 A.R. 88, 91 ("In applications for summary dismissal, the moving party has the onus of filing evidence to demonstrate the claims against him or her are hopeless and beyond doubt"); *B&L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221, ¶ 50 ("I cannot conclude that B&L's claim is bound to fail"); *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.*, 55 B.C.L.R. 137, 139 (C.A. 1984) ("if the defendant is bound to lose, the [summary judgment] application should be granted"); *Forsythe v. Furlotte*, 2016 NBCA 6, ¶ 24 ("The summary judgment test ... is a stringent one and is designed to determine whether there is any reason to doubt the outcome of the matter"); *Burns Bog Conservation Society v. Canada*, 2014 FCA 170, ¶ 43 ("This is a clear case where the appellant's claim must be weeded out because it is bound to fail"); *Palermo v. National Australia Bank*, [2017] QCA 321, ¶ 70 ("summary judgment for a plaintiff should be granted where it is clear that any available defence has no prospects of success ... or because a defence would be bound to fail"); *Thompson v. Turner Hopkins*, [2018] NZCA 197, ¶ 8 ("Where a defendant applies for summary judgment, a defendant has to show that the plaintiff cannot succeed") & *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 per Powell, J. (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'").

position will ultimately prevail is very high⁷ – the strength of the moving party’s case is many times that of the nonmoving party.⁸

[67] I adhere to this school of thought.

[68] So does Justice Brown, now of the Supreme Court of Canada. He has unequivocally endorsed this standard both before⁹ and after¹⁰ the Supreme Court’s judgment in *Hryniak v. Mauldin* came out. In *Orr v. Fort McKay First Nation*,¹¹ delivered after *Hryniak v. Mauldin*, he said this:

In *Deguire v. Burnett* ..., I recounted the various formulations found in our jurisprudence of the test for obtaining summary judgment. This included the threshold that it be ‘plain and obvious’ that the claim or defence will fail; that the claim or defence must be ‘bound to fail’ or have ‘no prospect of success’ or have ‘no merit’ or raise ‘no genuine issue for trial’. They are ... different ways of stating the same test. The formulation I preferred was (and remains) that stated in *Beier v Proper Cat Construction* ..., and in *O’Hanlon Paving Ltd v Serengetti Developments Ltd.* ... which requires the Court to consider whether the evidence renders a claim or defence so compelling that the likelihood it will succeed is very high. This formulation ... not only states the high threshold which an applicant must meet for obtaining summary judgment, but also contains within it the rationale for granting summary judgment and depriving the respondent of full access to all litigation tools. It is also consistent with those aspects of the Supreme Court’s statements in *Canada v Lameman* and *Hryniak v Mauldin*

⁷ E.g., *898294 Alberta Ltd. v. Riverside Quays Ltd. Partnership*, 2018 ABCA 281, ¶ 12 (“Summary judgment is reserved for the resolution of disputes where the outcome of the contest is obvious. ... Is the moving party’s position ... so compelling that its likelihood of success is very high and the nonmoving party’s likelihood of success very low?”); *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160, ¶ 2, 100 C.P.C. 7th 52, 61 (“Rule 7.3 of the *Alberta Rules of Court* allows a court to summarily dismiss an action that is without merit. A nonmoving party’s position is without merit if the moving party’s position is ... so compelling that its likelihood of success is very high and the nonmoving party’s likelihood of success is very low”); *W.P. v. Alberta*, 2014 ABCA 404, ¶ 26, 378 D.L.R. 4th 629, 642 (“The question is whether there is ... any issue of merit that *genuinely* requires a trial, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily”) (emphasis in original) & *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (“In essence ... the inquiry ... is ... whether the evidence presents a sufficient disagreement to require submissions to a jury or whether it is so one-sided that one party must prevail as a matter of law”).

⁸ *Stout v. Track*, 2015 ABCA 10, n. 65, 62 C.P.C. 7th 260, n. 65 per Wakeling, J.A. (there is a marked disparity if the moving party’s likelihood of success is at least four times greater than that of the nonmoving party).

⁹ *Deguire v. Burnett*, 2013 ABQB 488, ¶¶ 19-22, 36 R.P.R. 5th 60, 66-69.

¹⁰ *Nipshank v. Trimble*, 2014 ABQB 120, ¶ 14, 8 Alta. L.R. 6th 152, 158-59 & *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 29, 587 A.R. 16, 26.

¹¹ 2014 ABQB 111, ¶ 29, 587 A.R. 16, 26.

which I have identified as generally applicable to summary judgment applications brought beyond Ontario's borders. Just as it serves neither litigants nor the administration of justice to have claims or defences which are highly likely to succeed thwarted or delayed by forcing litigants to undertake the expense and delay of a full trial, neither are they served when summary judgment is used to prematurely extinguish a potentially meritorious claim or defence for the sake of economy. By its terms, the formulation of the test for summary judgment in *Beier v Proper Cat Construction* keeps the master's or judge's attention focussed upon resolving litigation in a timely and cost-effective manner by imposing a proportionate remedy where it can be said that a claim or defence ought to succeed or fail without further process. In doing so, it promotes robust application of Alberta's summary judgment rule despite its preclusion of factual determinations.

[69] The other test is of very recent origin – post *Hryniak v. Mauldin*. It insists that summary judgment may be granted if the moving party's position is established on a balance of probabilities and it is fair and just to deny the nonmoving party access to the full trial process.¹²

¹² *Arndt v. Banerji*, 2018 ABCA 176, ¶ 36 (the Court applied the *Stefanyk v. Sobeys Capital Inc.* test); *Stefanyk v. Sobeys Capital Inc.*, 2018 ABCA 125, ¶ 15, [2018] 5 W.W.R. 654, 661 (“is the record such that it is fair and just to decide summarily if the moving party has proven the case on a balance of probabilities”). There are a number of opinions that make no mention of the balance of probabilities component but favour the fair-and-just standard. *Amik Oilfield Equipment & Rentals Ltd. v. Beaumont Energy Inc.*, 2018 ABCA 88, ¶ 6 (“Under the new approach, summary judgment ought to be granted whenever there is no genuine issue requiring trial where the judge is able to reach a ‘fair and just determination on the merits on a motion for summary judgment’”); *Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432, ¶ 11, [2018] 5 W.W.R. 32, 47 (“The [*Hryniak v. Mauldin*] test requires the court to examine the existing record to see if a disposition that is fair and just to both parties can be made on the record”); *Precision Drilling Canada Ltd. Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378, ¶ 15, 60 Alta. L.R. 6th 57, 67 (“The so-called modern approach to summary judgment as laid out in *Hryniak v. Mauldin* was confirmed by the Alberta Court of Appeal in *Windsor v. Canadian Pacific Railway*... . *Windsor* indicates that on a summary judgment application, the appropriate question to ask is whether there is an issue of ‘merit’ that genuinely requires a trial A second consideration is ‘whether examination of the existing record can lead to an adjudication and disposition that is fair and just to both parties’”); *Goodswimmer v. Canada*, 2017 ABCA 365, ¶ 25, 418 D.L.R. 4th 157, 177 (“Litigation can be disposed of summarily when the court is able to reach a fair and just determination on the merits using a summary process. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result”); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46, ¶ 25, 612 A.R. 284, 289 (“The Supreme Court [in *Hryniak v. Mauldin*] held that summary judgment ought to be granted whenever there is no genuine issue requiring trial: ‘when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment’”); *Templanza v. Wolfman*, 2016 ABCA 1, ¶ 18, 612 A.R. 67, 71 (“summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record”); *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 406, ¶ 15, 52 C.L.R. 4th 17, 24 (“*Hryniak* and *Windsor* ... hold that summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record. ... Examining whether there is a ‘genuine issue for trial’ is still a valuable analytical tool in deciding whether a trial is

[70] The Chief Justice of Alberta struck a five-judge panel to resolve this controversy.¹³

[71] The chambers judge properly granted the respondent summary judgment.¹⁴ It is incontestable that the respondents, having pleaded the *Limitations Act*,¹⁵ are entitled to immunity from liability in respect of the appellant's claim.

II. Questions Presented

[72] Does the Supreme Court of Canada's judgment in *Hryniak v. Mauldin* affect the proper interpretation of the test for summary judgment under r. 7.3(1) of the *Alberta Rules of Court*?¹⁶

[73] If so, to what effect?

[74] What is the test for summary judgment in Alberta in the post *Hryniak v. Mauldin* era?

[75] Must the disparity between the strength of the moving and nonmoving parties' positions be so marked that the likelihood the moving party's position will ultimately prevail is very high? Must the ultimate outcome be obvious? Or is it enough if the court concludes that the moving party has established its case on a balance of probabilities and it is fair and just to make a determination?

[76] If the ultimate outcome must be obvious before summary judgment may be granted, is the respondent's position that the limitation period expired between four and eight months

required, or whether the matter can be disposed of summarily"); *Bilawchuk v. Bloos*, 2014 ABCA 399, ¶ 14 ("Under the new Rule, summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record"); *Maxwell v. Wal-Mart Canada Corp.*, 2014 ABCA 383, ¶ 12, 588 A.R. 6, 10 ("Under the new Rule, no genuine issue for trial exists where the judge is able to make a fair and just determination on the merits without a trial, because the summary judgment process allows him or her to make the necessary findings of fact, to apply the law to those facts and is a proportionate, more expeditious and just means to achieve a just result. Under the new Rule, summary judgment may be granted if a disposition that is fair and just to both parties can be made on the existing record") & *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, ¶ 13, 371 D.L.R. 4th 339, 349 ("The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record").

¹³ See 330626 *Alberta Ltd. v. Ho & Laviolette Engineering Ltd.*, 2018 ABQB 478, ¶ 41 (Feehan, J. asked the Court of Appeal to resolve this question).

¹⁴ An appeal court may substitute its assessment of the law if it disagrees with the original court. *Housen v. Nikolaisen*, 2002 SCC 33, ¶ 8, [2002] 2 S.C.R. 235, 247. A more demanding standard applies to the facts. An appeal court may disregard an original court's fact-finding decision only if it concludes that it is the product of a palpable and overriding error and is clearly wrong. *Id.* at ¶ 10, [2002] 2 S.C.R. at 248. An original court's application of the correct legal standard to facts may only be set aside by an appeal court if it concludes that the original court made a palpable and overriding error or is clearly wrong. *Id.* at ¶ 36, [2002] 2 S.C.R. at 262. The chambers judge made no reversible error.

¹⁵ R.S.A. 2000, c. L-12, s. 3(1)(a).

¹⁶ Alta. Reg. 124/2010.

before the appellant commenced its action so much stronger than the appellant's position that the likelihood the respondent will prevail is very high?

[77] If the summary judgment test is less demanding and only insists that the moving party establish its position on a balance of probabilities, has the respondent met this standard?

III. Brief Answers

[78] *Hryniak v. Mauldin*¹⁷ is an important decision.

[79] It makes two transcendent statements.

[80] First, it expressly declares the value of summary judgment and, by implication, other expedited dispute resolution procedures in a civil process environment in which conventional trials play a less prominent role than they once did because of their cost and the amount of time they require.

[81] Second, it confirms the assessment made long ago by the House of Lords,¹⁸ the English Court of Appeal¹⁹ and the United States Supreme Court²⁰ that summary judgment is not an inferior dispute resolution device that sacrifices procedural fairness in the pursuit of economical and expeditious resolution of disputes.

[82] But *Hryniak v. Mauldin*'s importance in Alberta must not be overstated. The Supreme Court's judgment did not alter the text of r. 7.3 or Part 1 – the foundational principles – of the *Alberta Rules of Court*²¹ or Alberta's *Interpretation Act*.²²

[83] There is no valid reason in the post *Hryniak v. Mauldin* era to interpret r. 7.3 of the *Alberta Rules of Court* in a manner different from that favoured in the pre-*Hryniak v. Mauldin* period.

[84] Courts must be faithful to the text of r. 7.3 of the *Alberta Rules of Court* and give the rule its plain and ordinary meaning, just as they did before January 23, 2014.

¹⁷ 2014 SCC 7, [2014] 1 S.C.R. 87.

¹⁸ *Jacobs v. Booth's Distillery Co.*, 85 L.T.R. 262, 262 (H.L. 1901).

¹⁹ *Swain v. Hillman*, [2001] 1 All E.R. 91, 92 & 94 (C.A.).

²⁰ *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

²¹ Alta. Reg. 124/2010.

²² R.S.A. 2000, c. I-8, s. 10.

[85] A court may grant summary judgment only if it concludes that the disparity between the strength of the moving and nonmoving parties' positions is so marked that the ultimate outcome of the dispute is obvious.

[86] The respondents' argument that the appellant's action is barred by the two-year limitation period in the *Limitations Act*²³ is so much more compelling than the appellant's argument that its claim is not barred by the *Limitations Act* that the likelihood the respondent will ultimately prevail is very high. The appellant has no chance of succeeding; the trial outcome is obvious.

[87] Summary judgment is the appropriate remedy under both the onerous and less onerous standards under review.

IV. Applicable Provisions of the *Alberta Rules of Court* and Their Historical Antecedents and the *Limitations Act*

A. Current Rules

[88] The key portions of Parts 1 and 7 of the *Alberta Rules of Court*,²⁴ in force as of November 1, 2010, are set out below:

Part 1: Foundational Rules

Division 1

Purpose and Intention of These Rules

...

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

²³ R.S.A. 2000, c. L-12, c. 3(1)(a).

²⁴ Alta. Reg. 124/2010. Section 92(13) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) authorizes a province to make laws in relations to "Property and Civil Rights in the Province". This provision authorizes a province to make civil procedure court rules. Section 28.1 of the *Judicature Act*, R.S.A. 2000, c. J-2 empowers the Lieutenant Governor in Council to make rules of court by regulation. The current *Alberta Rules of Court*, Alta. Reg. 124/2010 were enacted by the Lieutenant Governor in Council by order in council on July 14, 2010 and came into force on November 1, 2010. They were agreed to by the judicial branch of government.

(b) to facilitate the quickest means of resolving a claim at the least expense

...

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

...

(d) when using publicly funded Court resources, use them effectively

...

Part 7: Resolving Claims Without Full Trial

Division 1

Trial of Particular Questions or Issues

7.1(1) On application, the Court may

(a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of

(i) disposing of all or part of a claim,

(ii) substantially shortening a trial, or

(iii) saving expense ...

...

(3) If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of the issue unnecessary, it may

...

(b) give judgment on all or part of a claim and make any order it considers necessary ...

...

Division 2

Summary Judgment

...

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

- (a) there is no defence to a claim or part of it;
- (b) there is no merit to a claim or part of it;
- (c) the only real issue is the amount to be awarded.

(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

(3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

- (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
- (b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;
- (c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

...

Division 3

Summary Trials

...

7.5(1) A party may apply to a judge for judgment by way of a summary trial on an issue, a question, or generally.

(2) The application must

- (a) be in Form 36,

(b) specify the issue or question to be determined, or that the claim as a whole is to be determined,

(c) include reasons why the matter is suitable for determination by way of summary trial,

(d) be accompanied with an affidavit or any other evidence to be relied on, and

(e) specify a date for the hearing of the summary trial scheduled by the court clerk, which must be one month or longer after service of notice of the application on the respondent.

(3) The applicant may not file anything else for the purposes of the application except

(a) to adduce evidence that would, at trial, be admitted as rebuttal evidence, or

(b) with the judge's permission.

7.6 The respondent to an application for judgment by way of a summary trial must, 10 days or more before the date scheduled for the hearing of the application, file and serve on the applicant any affidavit or other evidence on which the respondent intends to rely at the hearing of the application.

B. Historical Antecedents

1. January 1, 1969 to October 31, 2010

[89] Rules 159 and 162 of the previous iteration of the *Alberta Rules of Court*,²⁵ in force before November 1, 2010, are as follows:

159(1) In any action in which a defence has been filed, the plaintiff may, on the ground that there is no defence to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for judgment on an affidavit made by him or some other person who can swear positively to the facts, verifying the claim or part of the claim and stating that in the deponent's belief

²⁵ *Alberta Rules of Court*, Alta. Reg. 390/68 (in force January 1, 1969). The rules were cited as *The Supreme Court Rules* until September 7, 1983. Alta. Reg. 338/83, s. 2. See Laycraft & Stevenson, "The Alberta Rules of Court – 1969", 7 Alta. L. Rev. 190, 192 (1969) ("The one major change in these rules is the replacement of the old Rules 128 and 140 with the single Rule 159. ... This procedure may be ... available in tort actions where it was not previously available").

there is no genuine issue to be tried or that the only genuine issue is as to amount.

(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.²⁶

...

(3) On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

...

162 At any stage of the proceedings the court may, upon application, give any judgment to which the applicant may be entitled when

- (a) admissions of fact have been made on the pleadings or otherwise, or
- (b) the only evidence consists of documents and such affidavits as are sufficient to prove their execution or identity.

2. July 1, 1944 to December 31, 1968

[90] Order XI of *The Consolidated Rules of the Supreme Court*,²⁷ in force as of July 1, 1944, reads, in part, as follows:

128 When a statement of claim includes a claim for a debt or liquidated demand and any defendant has delivered a defence, the plaintiff may on affidavit made by himself, or any other person who can swear positively to the facts, verifying the cause of action in respect of the debt or liquidated demand and the amount claimed and stating that in his belief there is no defence thereto, apply to a judge for leave to enter final judgment for the amount so verified together with interest, if any, and costs.

²⁶ Effective June 19, 1986 a defendant was given the option of applying for summary judgment. Alta. Reg. 216/86.

²⁷ O.C. 716/44.

129 Upon the hearing of the motion, unless the defendant by affidavit or his *viva voce* evidence or otherwise shall satisfy the judge that he has a good defence to the action on the merits or disclose such facts as may be deemed sufficient to entitle him to defend or shall bring into court the amount verified, the judge may direct that judgment be entered accordingly; but such judgment shall be without prejudice to the plaintiff's right to proceed against any other defendant or in respect of any other cause of action included in the statement of claim.

3. September 1, 1914 to June 30, 1944

[91] Rules 275 to 278 of *The Consolidated Rules of the Supreme Court*²⁸ are substantially the same as Rules 129 to 131 of the successor rules in force as of July 1, 1944.

129 Upon the hearing of the motion, unless the defendant by affidavit or his *viva voce* evidence or otherwise shall satisfy the judge that he has a good defence to the action on the merits or disclose such facts as may be deemed sufficient to entitle him to defend or shall bring into court the amount verified, the judge may direct that judgment be entered accordingly

130 If it appears that the defence set up by the defendant applies only to part of the plaintiff's claim or that any part of his claim is admitted, the judge may, if the circumstances make it convenient, direct that the plaintiff have judgment forthwith for or in respect of such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution or the payment of the amount levied or any part thereof into court by the sheriff; the taxation of costs or otherwise as the judge may think fit; and the defendant may be allowed to defend as to the residue of the plaintiff's claim.

131 If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action and that any other defendant has not such a defence and ought not to be permitted to defend, the former may be permitted to defend; and the judge may, if the circumstances make it convenient, direct that the plaintiff have judgment against the latter and the plaintiff may enforce such judgment without prejudice to his right to proceed with his action against the former.

C. *Limitations Act*

[92] Section 3(1) of the *Limitations Act*²⁹ reads as follows:

²⁸ O.C. August 12, 1914.

3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose, whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

V. Statement of Facts

A. Purolator's Business Structure

[93] Purolator Inc.³⁰ conducts an extensive freight-service business in Alberta.

[94] It operates a number of depots throughout Alberta that are serviced by owner-operator contractors.

[95] Purolator enters into owner-operator contracts with individuals or corporations to pick up and deliver freight. These contracts oblige an owner-operator to bear operation and maintenance costs and to secure liability insurance. Owner-operators must deliver to Purolator a daily summary of services provided. Purolator pays for these services "in accordance with the Owner Operator Compensation Plan". There is a base rate for a working day, a kilometer rate, a piece rate and other compensatory mechanisms.

[96] The Canadian Council of Teamsters is the sole bargaining agent under the *Canada Labour Code*³¹ "for all Owner/Operators performing pick-up and delivery work in ... Alberta". This is so whether the owner-operator is an individual or a corporation.

²⁹ R.S.A. 2000, c. L-12.

³⁰ Purolator Courier Ltd. changed its name to Purolator Inc.

[97] Purolator and the Teamsters entered into a collective agreement binding Purolator, the Teamsters and the owner-operators.

[98] The collective agreement stipulates that “[a]ll Owners/Operators hired must maintain membership in good standing in the Union for the duration of the present agreement, as a condition of continued service to the Company”. It also provides that the “Owner/Operator shall personally and exclusively operate the equipment supplied pursuant to this Owner/Operator Contract with [Purolator] ... [unless the owner-operator] is absent because of vacation, illness, accident or on leave of absence for reasons acceptable to [Purolator] and the Union”.

[99] The collective agreement has a grievance procedure for “any disagreement relating to the interpretation, application or alleged violation of the present Collective Agreement.” If a grievance cannot be resolved, an arbitrator selected by Purolator and the Teamsters or appointed by the Minister of Labour resolves the dispute.

B. Weir-Jones Technical Provided Pickup and Delivery Services for Purolator

[100] On January 23, 2008 Weir-Jones Technical Services Incorporated signed an owner-operator contract with Purolator.

[101] Under this agreement Weir-Jones Technical provided pickup and delivery services for routes in Bonnyville and Cold Lake from some time shortly after January 23, 2008 until August 21, 2009. Andrew Weir-Jones, Samantha Gordey and Robin Staff discharged Weir-Jones Technical’s obligations to Purolator under the owner-operator contract.

C. Weir-Jones Technical Alleged that Purolator Breached Contractual Commitments

[102] Weir-Jones Technical believed that Purolator failed to honor commitments made to Weir-Jones Technical to provide line-haul contracts for all oil field supplies and deliveries in the Cold Lake and Bonnyville areas and to utilize Weir-Jones Technical’s fuel-saving technology in its vehicles.

³¹ R.S.C. 1985, c. L-2, ss. 3(1) & 27(1). Owner-operators are dependent contractors. Dependent contractors are employees. Trade unions are certified bargaining agents of employees.

[103] Weir-Jones Technical first comprehensively stated its complaints to Purolator in a November 3, 2008 letter.³² This letter unequivocally states that Purolator has “intentionally and fraudulently misrepresented Purolator’s intentions.”

[104] The inadequacy of Purolator’s response to this letter must account for Weir-Jones Technical’s February 24, 2009 letter to Purolator’s chief executive officer, part of which is as follows:³³

In Q3 2007 staff from Weir-Jones Technical Services commenced a series of discussions with Purolator management from your Edmonton offices. This discussion concerned the implementation of innovative low carbon footprint vehicles on line haul routes initially in Northern Alberta. The vehicles would utilize thermal efficiency enhancement technologies, something which we have been working on for a number of years. The objectives were (a) to demonstrate the efficiency of the technologies (b) to enable Purolator to show, in a very practical manner, that they were committed to reducing their corporate carbon footprint, (c) to implement a technology which would have an immediate impact on Purolator’s operating costs, and (d) to provide ... [Weir-Jones Technical] with a long term revenue stream.

The discussions continued and, in Q4 2007, Mike Gieck assumed the role of point man for Purolator. In summary Mr. Gieck made commitments that one or more line-haul routes would be awarded to ... [Weir-Jones Technical], however, in order to facilitate this he requested that we enter into contracts for the provision of local delivery services on routes in Bonnyville and Cold Lake. This was done in January 2008 and, subsequent to commencing these contracts discussions continued in great detail about the promised line-haul routes. ... [I]n the final analysis Mr. Gieck reneged on this commitment to make one or more line-haul routes available to us. In the words of a Purolator manager “*Mike conned you and led you up the garden path – all he really wanted was someone to handle the Bonnyville and Cold Lake routes*”.

Our position is that we have incurred significant expenses, both capital and operational, in order to provide the services which were requested of us by Mr. Gieck. *Since September 2008 it has become apparent to us that Mr. Gieck’s objectives were not as he represented to us.*

³² An October 8, 2008 letter from Weir-Jones Technical to Purolator asserted that Purolator had failed as promised “to award ... [Weir-Jones Technical] a contract for the bulk delivery of freight from Purolator’s depot in Edmonton to distribution sites in Bonnyville and Fort McMurray”.

³³ Emphasis added.

[105] Weir-Jones Technical enclosed in its February 24, 2009 letter its counsel's February 18, 2009 letter. Counsel unequivocally stated that Weir-Jones Technical may have an action against Purolator based on the facts recorded in the November 3, 2008 and February 24, 2009 letters from Weir-Jones Technical to Purolator:

As I indicated at the outset of this correspondence, you have asked me to opine on the availability of remedies that ... [Weir-Jones Technical] may have against Purolator. The information you have provided to me suggests that there are several instances where representations were made to ... [Weir-Jones Technical] by senior Purolator personnel and that ... [Weir-Jones Technical] has relied on those representations to its detriment. On the proof of those circumstances ... [Weir-Jones Technical] would likely be entitled to damages, certainly equalling its lost expenditures, and in the ordinary cause, compensating for profits which would have been earned had Purolator's representations been honoured.

[106] Purolator's in-house counsel replied on March 25, 2009. She asked Weir-Jones Technical to produce the documents that contain the promises to which Weir-Jones Technical referred in its February 24, 2009 letter. Responding directly to Weir-Jones Technical's statement in its February 24, 2009 letter that it would like to resolve outstanding issues "without the need to further involve counsel", in-house counsel acknowledged that "Purolator would also like to resolve this matter without costly legal proceedings".

[107] In a May 11, 2009 letter Weir-Jones Technical informed Purolator's in-house counsel that most of its claims "are unrelated to the matters covered by the Collective Agreement" and that it intends to "[c]ommence action(s) in all appropriate jurisdictions in connections with all matters which do not fall under the terms of the Collective Agreement".

D. Weir-Jones Technical Invokes the Teamsters' Assistance

[108] Sometime in 2008 Weir-Jones Technical asked the Teamsters for assistance.

[109] The Teamsters filed eight grievances on behalf of Andrew Weir-Jones and Samantha Gordey in the period commencing November 12, 2008 and ending April 23, 2009.

[110] These grievances were the subject of a memorandum of agreement dated October 2, 2015 between Purolator and Mr. Weir-Jones and Ms. Gordey. Purolator promised to pay the grievors a sum of money within a defined period of time. Another provision in the October 2, 2015 memorandum of agreement stated that "[t]he present memorandum is made without prejudice whatsoever to the Plaintiffs' [sic] and Defendants' respective claims and positions in

the civil action instituted before the Court of Queen's Bench of Alberta, in Court file No. 1114-00276 ...³⁴

E. Weir-Jones Technical Commenced an Action Against Purolator on July 22, 2011

[111] On July 22, 2011 Weir-Jones Technical Services sued Purolator Courier Ltd., Purolator Inc. and Purolator Freight. The key parts of the claim are set out below:

3. On or about February 2008 through August 2009, the parties entered into an agreement for services and supplies which provided, inter alia, that the Plaintiff would perform courier services on behalf of the Defendant [sic] in and around Bonnyville ... and supply proprietary fuel saving technology installations for the Defendant's courier truck fleet. In addition, by agreement with the Defendant [sic], the Plaintiff performed repairs on trucks which the Defendant [sic] rented from Ryder's Connection truck rental services. In addition, the Defendant [sic] agreed to reimburse the ... [Plaintiff] for travel and accommodation costs incurred for performing its contractual obligations to the Defendant [sic] in and around Bonnyville, Alberta.

4. On or about February 2008, through August 2009, the Defendant [sic] represented that it would provide line haul contracts to the Plaintiff for all oil field supplies and deliveries within the Cold Lake/Bonnyville areas. In reliance upon the Defendants' representation(s), the Plaintiff incurred expenses for the placement of equipment and vehicles in the area for the provision of the oil field services.

[112] The plaintiff claimed damages for breach of contract and detrimental reliance "of at least \$211,000.00" plus interest.

[113] Almost two months before Purolator settled the outstanding grievances the Teamsters had filed on behalf of Mr. Weir-Jones and Ms. Gordey, Purolator filed a statement of defence, part of which is as follows:

12. The Plaintiff knew or ought to have known by October of 2008, of all facts giving rise to any potential claim.

13. The Defendants plead and rely upon the *Limitations Act*, RSA 2000, c L-12.

³⁴ This is the action Weir-Jones Technical commenced against Purolator Courier Ltd., Purolator Ltd. and Purolator Freight in the Court of Queen's Bench on July 22, 2011.

F. Purolator Applied for Summary Dismissal of Weir-Jones Technical's Action

[114] On October 9, 2015 Purolator applied for summary dismissal of Weir-Jones Technical's action.

[115] It filed a supporting affidavit that exhibited Weir-Jones Technical's correspondence to Purolator claiming a breach by Purolator of its legal obligations to Weir-Jones Technical.³⁵ The deponent stated that he believed there is no merit to Weir-Jones Technical's claim.³⁶

[116] Weir-Jones Technical filed two affidavits by the same deponent opposing summary dismissal of its claim.³⁷

[117] These affidavits pursued one objective – explain why Weir-Jones Technical waited until July 22, 2011 to sue Purolator.

[118] The deponent advanced three reasons.

[119] First, the company hoped that the Teamsters might be able to assist with not only the resolution of the issues captured by the grievances that were filed before April 24, 2009 but those that fell outside the scope of the collective agreement. The deponent swore that the Teamsters had "indicated its willingness to resolve our issues collectively, whether strictly inside ... [or] outside of the Collective Agreement."³⁸

[120] Second, the company believed that it "had an agreement with Purolator in 2009 to hold off on litigation and to attempt to negotiate a settlement".³⁹ The bases for this belief were statements by both sides that they wished to resolve their differences without resorting to litigation.

[121] Third, the deponent thought that the two-year limitation period expired August 18, 2011.⁴⁰

6. At the time I filed the Statement of Claim, July 22, 2011, I did so on the understanding that Weir-Jones Technical ... had terminated its relations with

³⁵ Affidavit of Mike Gieck sworn October 14, 2015.

³⁶ Id. ¶ 10.

³⁷ Affidavits of Andrew Weir-Jones sworn December 4, 2015 and April 8, 2016.

³⁸ December 4, 2015 affidavit, ¶ 19.

³⁹ April 8, 2016 affidavit, ¶ 26.

⁴⁰ Id. ¶ 6.

Purolator by way of a termination letter dated August 18, 2009 ... I believed that the letter would start the limitation period running, i.e., that I believed that I would have two years within which to sue Purolator from the date of the termination letter, August 18, 2009.

G. The Chambers Judge Granted Purolator Summary Judgment

[122] Justice Shelley accepted all Purolator's major arguments and granted it summary dismissal.⁴¹

[123] First, she concluded that Weir-Jones Technical was aware of the facts on which it based its action against Purolator and that the injury warranted bringing a proceeding more than two years before it sued Purolator.⁴²

[124] Second, there was no standstill argument in effect. The correspondence on which Weir-Jones Technical relied did nothing more than document the disputants' "desire to attempt to settle the matter without recourse to the Courts".⁴³

[125] Third, the essential components of promissory estoppel were not in place.⁴⁴ Purolator never promised not to invoke the *Limitations Act*.⁴⁵

[126] Justice Shelley held that summary judgment may be granted if there is no "issue of merit that genuinely requires a trial or, conversely, whether the defence is so compelling that the likelihood it will succeed is very high."⁴⁶ While Justice Shelley did not identify the standard she favoured or applied, she held that "[t]he evidence ... clearly establishes that ... [Weir-Jones Technical] was aware of the alleged breaches ... [and that it filed its suit] more than two years after the limitation period or periods commenced and the claims it contained were ... barred by s 3(1) of the [*Limitations Act*]"⁴⁷.

VI. Analysis

A. Summary Judgment Is an Essential Feature of a Modern Civil Procedure System

⁴¹ 2017 ABQB 491.

⁴² 2017 ABQB 491, ¶¶ 36, 37 & 42.

⁴³ *Id.* ¶ 40.

⁴⁴ *Id.* ¶¶ 40 & 41.

⁴⁵ R.S.A. 2000, c. L-12.

⁴⁶ 2017 ABQB 491, ¶ 24.

⁴⁷ *Id.* ¶¶ 36 & 42.

[127] Summary judgment is an essential feature of a modern civil procedure system.⁴⁸ I know of no Canadian or Commonwealth judge who disagrees with this proposition.⁴⁹

[128] There is an inverse relationship between the importance of summary judgment and other expedited dispute resolution procedures and the efficacy of the traditional trial process. As the amount of time that separates the commencement of an action and its resolution by conventional trial⁵⁰ escalates⁵¹ – the passage of time diminishes the value of the conventional trial⁵² – the need to have a functioning summary judgment model increases in importance.⁵³

⁴⁸ *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶ 1, 20 C.P.C. 8th 43, 45 (“Modern civil procedure codes have a summary judgment protocol. They are designed to remove from the litigation stream proceedings the outcomes of which are obvious”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) per Rehnquist, J. (“Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole”); Cavanagh, “*Matsushita* at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?”, 82 Antitrust L.J. 81, 111-12 (2018) (“*Matsushita*, together with its companion cases *Anderson* and *Celotex*, has ... revived Rule 56 from its dormancy and restored summary judgment to its proper role in the Federal Rule’s procedural scheme – to provide a mechanism for disposal of cases not worthy of trial. ... [S]ummary judgment ... is an integral part of the Federal Rules and consistent with their goal ‘to secure the just, speedy and inexpensive determination of every action and proceeding’”) & Clark & Samenow, “The Summary Judgment,” 38 Yale L.J. 423, 423 (1929) (“As an effective remedy for such delay within the limits prescribed by its form and purpose, the summary judgment procedure has become an important feature of the most modern practice systems”).

⁴⁹ Some American judges do. E.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 176 (1970) per Black, J. (“The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases”) & *Whitaker v. Coleman*, 115 F. 2d 305, 306 (5th Cir. 1940) (“The invoked procedure [*Federal Rules of Civil Procedure* 56], valuable as it is for striking through sham claims and defences which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial”).

⁵⁰ See American Bar Association Judicial Administration Division, Standards Relating to Trial Courts § 2.52(a) (1992) (“General civil – 90% of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98% within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur”).

⁵¹ E.g., *Chu v. Chen*, 2002 BCSC 906, ¶ 23, 22 C.P.C. 5th 73, 80 (“In the mid to late 1970’s there was a time interval of about 6 to 9 months from the date a party applied to the court for a trial date and the first day the court assigned for the trial’s commencement. ... By the early 1980’s, the time interval from application for a trial date to the conventional trial date itself increased from about 6 to 9 months to around 12 to 18 months”).

⁵² Organization for Economic Co-operation and Development, Economics Department Policy Note No. 18, “What Makes Civil Justice Effective?” ¶ 2 (June 2013) (“Lengthy [periods between the commencement of proceedings and trial disposition] ... undermine certainty of transactions and investment returns, and impose heavy costs on firms. Moreover, the length of trials is related to other crucial measures of performance such as confidence in the justice system: OECD analyses on surveys of individuals in different countries suggest that a 10% increase in the average length of [trial disposition] ... is associated with a decrease of around 2 percentage points in the probability to have confidence in the justice system”).

[129] Regrettably, there is no reason to believe that the amount of time it currently takes for conventional trials in the Court of Queen’s Bench of Alberta to close litigation files will trend downwards in the foreseeable future.⁵⁴ Until this happens, expedited dispute resolution processes will continue to be of paramount importance in Alberta.

[130] Needless to say, the test for summary judgment or any other Part 7 protocol is contained in the text and is not a function of how poorly funded the court system or how clogged the conventional trial process is.

[131] Part 7 of the *Alberta Rules of Court*⁵⁵ allows a court to resolve a dispute without utilizing the time-consuming and expensive processes associated with a traditional trial.⁵⁶ Our

⁵³ The Supreme Court of Canada has recognized this correlation. *Hryniak v. Mauldin*, 2014 SCC 7, ¶¶ 1-3, [2014] 1 S.C.R. 87, 92-93 (the Court acknowledged that the cost and delay associated with conventional trials diminished their value and correspondingly enhanced the value of other dispute resolution procedures). Americans refuse to accept that excessive delay is inevitable. American Bar Association Judicial Administration Division, Standards Relating to Trial Courts § 2.51(a) (1992) (“[the Standards promote] Court supervision and control of the movement of all cases from the time of filing ... through final disposition”) & Kolb, “ABA Fights Court Delay”, 72 A.B.A.J. 161 (1986) (“The [ABA] task force is seeking to have the bench and bar in every jurisdiction adopt the Court Delay Reduction Standards”). See also Cavanagh, “*Matsushita* at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?”, 82 Antitrust L.J. 81, 119 (2018) (“As caseloads expand and litigation costs escalate, judges will continue to use summary judgment to manage their dockets”) & Schwarzer, Hirsch & Barrans, “The Analysis and Decision of Summary Judgment Motions” vii (Federal Judicial Centre 1991) (“Growing concern over cost and delay in civil litigation has focused increased attention on Rule 56 as a vehicle to implement the objectives of Fed. R. Civ. P. 1 – the just, speedy, and inexpensive resolution of litigation”).

⁵⁴ The Court of Queen’s Bench of Alberta does not publish statistics recording on an annual basis the number of actions that are concluded by summary judgment, summary trial or a conventional trial or the amount of time that passes after an action is commenced and it is concluded by various file-closing events. This is essential information for those interested in the efficacious administration of justice. See Organization for Economic Co-operation and Development, Economics Department Policy Note No. 18, “What Makes Civil Justice Effective?” ¶ 10 (June 2013) (“A court system with a good degree of informatisation is essential to the development of so-called caseflow management techniques that allow for a smoother functioning of courts. Caseflow management broadly indicates the set of actions that a court can take to monitor the progress of cases and to make sure that they are managed efficiently. It includes for example the monitoring and enforcement of deadlines, the screening of cases for the selection of an appropriate dispute resolution track, and the early identification of potentially problematic cases”).

⁵⁵ Alta. Reg. 124/2010.

⁵⁶ *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶ 1, 20 C.P.C. 8th 43, 45-46 (“[summary judgment protocols] are designed to remove from the litigation stream proceedings the outcomes of which are obvious – they feature either unmeritorious claims or defences – and warrant allocation of minimal public and private resources”); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 71, 35 R.P.R. 5th 105, 134 (“[the] proper use [of summary judgment] expedites litigation, reduces costs for the litigants, frees up scarce judicial resources and ameliorates access to justice issues”); *Greene v. Field Atkinson Perraton*, 1999 ABQB 239, ¶ 1 (Master) (“The purpose of the rules is to reject promptly and inexpensively, claims and defences that are bound to fail at trial”); *Espey v. Chapters Inc.*, 225 A.R. 68, 73 (Q.B. 1998) (“A summary judgment procedure is swift, cheap and efficient, with the same neutral evaluation before an impartial judge”); *Combined Air Mechanical*

rules recognize that a party does not have an absolute right to “access ... all stages of the litigation spectrum”.⁵⁷

[132] Part 7 introduces distinct⁵⁸ protocols that authorize a court to determine relatively early in the civil procedure process questions of fact or law in order to expedite the resolution of all or part of a claim or to grant judgment under an application for summary judgment or summary trial.⁵⁹ “Alberta’s summary judgment protocol and the other procedures in the Part 7 suite of

Services v. Flesch, 2011 ONCA 764, ¶ 2, 286 O.A.C. 3, 17 (“summary judgment is intended to provide a means for resolving litigation expeditiously and with comparatively less cost than is associated with a conventional trial”); *Swain v. Hillman*, [2001] 1 All E.R. 91, 94 per Lord Woolf, M.R. (C.A. 1999) (“a judge ... should make use of the [summary judgment] powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt. 1. It saves expense; it achieves expedition; it avoids the court’s resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) per Rehnquist, J. (“Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integrated part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action’”) & *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 266-67 (1986) per Brennan, J. (“[summary judgment is] an expedited ... procedure”). See also A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* 378 (3d ed. 2013) (“To insist that such disputes should nevertheless follow the full procedural course would waste valuable resources and, worse still, would enable unscrupulous litigants to harass their opponents by putting them to unnecessary trouble and expense and by keeping them out of their entitlements pending resolution of the case”).

⁵⁷ *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 56, 35 R.P.R. 5th 105, 126. See also *id.* (“The common law principle that a person has a right to be heard ... is not more important than speedy resolution of meritless claims or defences the continuation of which drive up the cost of litigation for everyone not just those prosecuting an action or maintaining a defence which has no real prospect of success”) & *O’Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, ¶ 33, 18 B.L.R. 5th 73, 88 (“A summary judgment protocol recognizes that it is not unjust to deny a plaintiff with a meritless claim or a defendant with a meritless defence access to all stages of the litigation process”).

⁵⁸ Summary judgment and summary trial are fundamentally different processes. One is a trial; one is not. One may hear oral evidence. The other should not. *Can v. Calgary Police Service*, 2014 ABCA 322, ¶¶ 84-95, 315 C.C.C. 3d 337, 378-84 per Wakeling, J.A. These differences account for the Alberta Law Reform Commissions’ recommendation to accord them distinct roles. Summary Disposition of Actions xv (Consultation Memorandum No. 12.12 August 2004).

⁵⁹ Summary trials have been available in British Columbia since September 1, 1983. B.C. Reg. 178/83, s. 3. The current provision is r. 9-7. *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Alberta has had summary trials with oral evidence since September 1, 1998. *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 152/98. Summary trials are features of Saskatchewan’s *Queen’s Bench Rules*, r. 7-5(3) (“For the purposes of exercising any of the powers set out in subrule (2), a judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation”) & Part 8 (abbreviated trial procedure if the trial of an action will be three days or less), Manitoba’s *Court of Queen’s Bench Rules*, Man. Reg. 553/88, r. 20.03(7) (“Without limiting the generality of subrule (6), the judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation”), Ontario’s *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(2.2) (“A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation”), & r. 76 (simplified procedure for a restricted category of claims), Prince Edward Island’s *Rules of Civil Procedure*, R. 20.04(6) (“A judge may, for the purpose of exercising any of the powers set out in subrule (5), order that oral evidence be presented by one

expedited procedures are built on a foundation that assumes the features a dispute displays may determine the parts of the litigation spectrum which must be accessed to resolve it”.⁶⁰

[133] Summary judgment is undoubtedly the Part 7 protocol most frequently utilized by Alberta litigants who seek expedited judicial recognition of the strength of either their claim or their defence to a claim.⁶¹ Alberta judges have promoted its use.⁶²

[134] This expedited dispute resolution process is also an important aspect of the civil procedure regimes of all Canadian jurisdictions⁶³ and those of England and Wales,⁶⁴

or more parties, with or without time limits on its presentation”) & R. 75 (quick ruling procedure) and the *Federal Court Rules*, SOR/98-106, r. 216 (3) (“The Court may make any order required for the conduct of the summary trial, including an order requiring a deponent or an expert who has given a statement to attend for cross-examination before the Court”). Summary trial procedures were used, in Roman law, continental law and early Anglo-American chancery and admiralty procedures. Millar, “Three American Ventures in Summary Civil Procedure”, 38 Yale L.J. 193 (1928).

⁶⁰ *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 78, 315 C.C.C. 3d 337, 374 per Wakeling, J.A. See also *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 29, 587 A.R. 16, 26 (summary judgment is a “proportionate remedy”).

⁶¹ I have identified over 1000 reported Alberta judgments in the period commencing 1908 and ending January 31, 2014. See 1 W. Stevenson & J. Côté, *Alberta Civil Procedure Handbook* 2019, at 7-13 (“This Rule is one of the most important, and most heavily relied upon in chambers”). Regrettably, neither the records of the Court of Queen’s Bench or the Court of Appeal track the number of summary judgment applications made and heard on an annual basis.

⁶² E.g., *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 71, 35 R.P.R. 5th 105, 134 (“summary judgment is an important procedure which could be invoked more often than it is”).

⁶³ *Supreme Court Rules*, B.C. Reg. 168/2009, R. 9-6(5)(a) (a court may grant summary judgment if “there is no genuine issue for trial”); *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 7.3 (a court may grant summary judgment if a claim or defence has no merit); *The Queen’s Bench Rules*, r. 7-5(1) (Saskatchewan) (“The Court may grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment”); *Court of Queen’s Bench Rules*, Man. Reg. 553/88, 20.07(1) (“The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence”); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(2) (“The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment”); *Rules of Court*, N.B. Reg. 82-73, R. 22.04(1) (“The court shall grant summary judgment if (a) the court is satisfied there is no genuine issue requiring a trial with respect to a claim or defence, or (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied it is appropriate to grant summary judgment”); Nova Scotia’s *Civil Procedure Rules*, r. 13.04(2) (“When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success”); Prince Edward Island’s *Rules of Civil Procedure*, R. 20.04 (a court may grant summary judgment if there is no “genuine issue requiring a trial”); *Rules of the Supreme Court*, 1986, S.N.L. 1986, c. 42, Sch. D, r. 17.01 (a court may grant summary judgment to a plaintiff if the “defendant has no defence to a claim”) & 17A.03(1) (“Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary

Australia,⁶⁵ New Zealand,⁶⁶ Hong Kong⁶⁷ and the United States.⁶⁸ Sophisticated civil process systems recognize that the public interest is best served by mechanisms that allow a court to

judgment accordingly”); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, r. 176(2) (“Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly”); *Rules of Court for the Supreme Court of Yukon*, R. 18(1) (“the plaintiff, on the ground that there is no defence to the whole or part of a claim ... may apply to the court for judgment on an affidavit setting out the facts verifying the claim or part of the claim and stating that the deponent knows of no fact which would constitute a defence to the claim or part of the claim except as to amount”) & *Federal Court Rules*, SOR/98-106, r. 215 (1) (“If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly”).

⁶⁴ *Civil Procedure Rules 1998*, S.I. 1998/3132, r. 24.2 (a court may give summary judgment against a claimant or defendant if the “claimant has no real prospect of succeeding on the claim ... or ... [the] defendant has no real prospect of successfully defending the claim ... and ... there is no other reason why the case or issue should be disposed of at a trial”). See *Swain v. Hillman*, [2001] 1 All E.R. 91, 94 (C.A. 1999) per Lord Woolf M.R. (“It is important that a judge in appropriate cases should make use of the powers contained in Pt. 24. ... If a claimant has a case which is bound to fail, then it is in the claimant’s interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible”) & Woolf, Access to Justice: Final Report to the Civil Justice System in England and Wales 123 (1996) (“The test for making an order would be that the court considered that a party had no realistic prospect of succeeding at trial on the whole case or on a particular issue”). This rule came into force on April 26, 1999. Under the previous regimes, only the plaintiff could apply for summary judgment and had to establish that the “defendant [had] ... no defence”. *Rules of the Supreme Court*, 1965, Order 14, R. 1 (in force October 1, 1966); *The Rules of the Supreme Court*, 1883, Order III, R. 6 & Order XIV, R. 1 (in force October 24, 1883) & *Rules of Procedure*, Order XIV & *Supreme Court of Judicature Act*, 1875, 38 & 39 Vict., c. 77, First Sch. (in force November 1, 1875). See *Ray v. Barker*, 4 Ex. D. 279, 281-82 (1879) (“Order XIV ... improves the procedure very much in actions for debts, where there is really no defence, for it saves the expense attending the formality of a trial at which perhaps the defendant will not appear. Nevertheless it is a remedy, which ought not to be used except where the plaintiff’s case is clear: if there be any doubt as to the right to recover, he ought not be allowed to avail himself of a process, so summary in its nature”).

⁶⁵ New South Wales’ *Uniform Civil Procedure Rules 2005*, r. 13.1(1) (“If, on application by the plaintiff in relation to the plaintiff’s claim for relief or any part of the plaintiff’s claim for relief: (a) there is evidence of the facts on which the claim or part of the claim is based, and (b) there is evidence, given by the plaintiff or by some responsible person, that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed, the court may give such judgment for the plaintiff, or make such order on the claim or that part of the claim, as the case requires”); Queensland’s *Uniform Civil Procedure Rules 1999*, rr. 292 & 293 (the court may give judgment for the moving party if the nonmoving party “has no real prospect” of defending its position); *Palermo v. National Australia Bank Ltd.*, [2017] QCA 321, ¶ 70 (“a case for summary judgment is one where it is clear that a trial is unnecessary, and that it is better to end the proceedings, than to proceed to a contest. ... This approach is consistent with the UK legislation on which the rule was modelled”); Victoria’s *Civil Procedure Act 2010*, No. 47, ss. 61 & 62 & *Supreme Court (General Civil Procedure) Rules 2015*, S.R. No. 103/2015, R. 22.04 (the court may give summary judgment for the moving party if the nonmoving party “has no real prospect” of defending its position); *Russell v. Wisewould Mahony Lawyers*, [2018] VSCA 125, ¶ 8 (“The test for summary judgment is a stringent one. It must be shown that the proceeding has no real prospect of success, in the sense that a claim or defence has only a ‘fanciful’ prospect of success”); *Gull Lexington Group Pty. Ltd. v. Laguna Bay (Banongill) Agricultural Pty. Ltd.*, [2018] VSCA 85, ¶ 123 (“the power to terminate proceedings summarily should be exercised with caution and thus should not be exercised unless it is clear that there is no real question to be tried”); Tasmania’s *Supreme Court Rules 2000*, rr. 357 & 367 (a court may give a plaintiff summary judgment if the nonmoving party has “no defence” to the claim;

a court may give summary judgment to a defendant if the “defendant has a good defence on the merits”); Western Australia’s *Rules of the Supreme Court 1971*, Order 14, r. 1(1) (“the plaintiff may, on the ground that ... [the] defendant has no defence to ... such claim ... within 21 days after appearance or at any later time by leave of the Court, apply to the Court for judgment against ... [the] defendant”) & Order 16, r. 1(1) (“Any defendant ... may ... apply to the Court for summary judgment, and the Court, if satisfied that the action is frivolous or vexatious, that the defendant has a good defence on the merits, or that the action should be disposed of summarily ... may order ... that judgment be entered for the defendant”); *Davey v. Quigley*, [2018] WASCA 137, ¶ 19 (“summary judgment ... should be awarded only in the clearest of cases, where one party can demonstrate that the question will certainly be resolved in their favour”); South Australia’s *Supreme Court Civil Rules 2006*, r. 232 (the Court may give summary judgment if satisfied that the nonmoving party has no “reasonable basis” for its position); Northern Territory’s *Supreme Court Rules*, r. 22.01(1) & (2) (a court may give summary judgment if it is satisfied that the nonmoving party “has no reasonable prospect of successfully [prosecuting or defending]”) & r. 22.01(3) (“For this rule, a defence of a proceeding ... need not be hopeless or bound to fail for it to have no reasonable prospect of success”); Australian Capital Territory’s *Court Procedure Rules 2006*, rr. 1146 & 1147 (the court may give the moving party summary judgment if satisfied that the nonmoving party’s position is indefensible); *Federal Court of Australia Act 1976*, No. 156, s. 31A(1) (the Court may grant summary judgment if satisfied that the nonmoving party “has no reasonable prospect of successfully defending” its position) & (3) (“For the purposes of this section, a defence or a proceeding ... need not be: (a) hopeless; or (b) bound to fail; for it to have no reasonable prospects of success”) & *Kimber v. Owners Strata Plan No. 48216*, [2017] FCAFC 226, ¶ 78 (“the moving party on an application for summary judgment or dismissal would have to show a substantial absence of merit on either issues of fact or law to have a chance of persuading the Court that those questions should be resolved summarily”).

⁶⁶ *High Court Rules 2016*, r. 12.2(1) (“The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action ... or to a particular part of ... [a] cause of action”) & r.12.2(2) (“The court may give judgment against a plaintiff if the defendant satisfies the court the none of the causes of action ... can succeed”).

⁶⁷ *The Rules of the High Court*, H.C. Ordinance, c. 4, s. 54, Ord. 14, r. 1(1) (“Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part ... apply to the Court for judgment against that defendant”). See *Skillsoft Asia Pacific Pty Ltd. v. Ambow Education Holdings Ltd.*, [2013] HKCFI 2108, ¶ 26 (the court granted summary judgment for the payment of an outstanding amount payable before the defendant terminated the contract: “I agree ... that the [defendant’s] argument is completely contrary to the established principle of law that the termination of an agreement would not affect any right or liability which has been crystallised prior to termination. In the absence of clear wording, I do not begin to see how the court can construe the Agreement as one which undermines such established principle”) & Cameron, “Summary Judgment: Law and Procedure in Transition”, 24 Hong Kong L. Rev. 347 (1994).

⁶⁸ This is so for both federal and state civil procedure. For the federal process see *Federal Rules of Civil Procedure* 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law”). The *Federal Rules of Civil Procedure*, in force since 1938, “extended the applicability of ... [summary judgment] to all cases, including those arising in equity, and to all parties”. Issacharoff & Loewenstein, “Second Thoughts About Summary Judgment”, 100 Yale L.J. 73, 76 (1990). See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) per Rehnquist, J. (“One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defences”); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 per Powell, J. (1986) (“Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial’”) & The Federal Judicial Center, Report on Summary Judgment Practice Across Districts with Variations in Local Rules 2 (2008) (“Overall, 17% of the cases [in the federal district court] have at least one motion for summary judgment”). See generally Schwarzer, Hirsch & Barrans, “The Analysis and

resolve a dispute as early in the process as is feasible and with the utilization of the least-possible judicial and private resources.⁶⁹

[135] Summary judgment protocols in common law jurisdictions can be traced to England's 1855 *Summary Procedure on Bills of Exchange Act*.⁷⁰ This statute and subsequent enactments

Decision of Summary Judgment Motions" (Federal Judicial Centre 1991). American state civil procedure rules also feature summary judgment. E.g., *California Code of Civil Procedure*, § 437c (a)(1) ("A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding") & (c) ("The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); New York's *Civil Practice Law and Rules* 3212 (b) ("A motion for summary judgment shall be supported by affidavit. ... The affidavit ... shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. ... The motion [for summary judgment] shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party") & *Michigan Court Rules of 1985*, 2.116(I)(1) ("[I]f the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay"). See also, Clark & Samenow, "The Summary Judgment", 38 Yale L.J. 423, 423 (1929) ("Dissatisfaction in and out of the profession with the 'law's delay' has long been manifested. As an effective remedy for such delay within the limits prescribed by its form and purpose, the summary judgment procedure has become an important feature of the most modern practice systems") & Friedenthal & Gardner, "Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging", 31 Hofstra L. Rev. 91, 97 (2002) ("several states enacted summary judgment statutes based on the English model in the late 1800s").

⁶⁹ *Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432, ¶ 75, [2018] 5 W.W.R. 32, 58 per Wakeling, J.A. ("These [summary judgment] measures recognized that it was not in the public interest to allocate more judicial and private resources or utilize more time than was absolutely necessary to resolve disputes the ultimate outcome of which was obvious at the earliest possible stage of the litigation"); *Nipshank v. Trimble*, 2014 ABQB 120, ¶ 14, 8 Alta. L.R. 6th 152, 158-59 (Brown, J. asserted that it was also desirable to match the dispute and the resolution process that was most suitable to the features of the dispute); *Orr v. Fort McKay First Nations*, 2014 ABQB 111, ¶ 29, 587 A.R. 16, 26 ("By its terms, the formulation of the test for summary judgment in *Beier v. Proper Cat Construction Ltd.* keeps the ... judge's attention focussed upon resolving litigation in a timely and cost-effective manner by imposing a proportionate remedy where it can be said that a claim or defence ought to succeed or fail without further process"); *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, ¶ 34, 18 B.L.R. 5th 73, 88 ("Legislators in the United Kingdom, Canada and the United States have introduced summary judgment into their litigation model to ensure that dispute resolution takes place at the earliest point in the litigation continuum where it is just to do so"); *Dawson v. Rexcroft Storage and Warehouse Inc.*, 164 D.L.R. 4th 257, 265 (Ont. C.A. 1998) ("The essential purpose of summary judgment is to isolate, and then terminate, claims and defences that are factually unsupported"); *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, ¶ 2, 108 O.R. 3d 1, 7 ("the vehicle of a motion for summary judgment is intended to provide a means for resolving litigation expeditiously and with comparatively less cost than is associated with a conventional trial") & *Apsley v. Boeing Co.*, 722 F. Supp. 2d 1218, 1230-31 (D. Kan. 2010) ("summary judgment ... is an important procedure designed to secure just, speedy and inexpensive determination of every action"). See also Clark & Samenow, "The Summary Judgment", 38 Yale L.J. 423, 435 (1929) ("The English rules seemed to have well served the purposes for which they were designed. ... Their effect on English procedure can best be shown by the court statistics of recent years when the process of litigation has well brought out the efficacy of the Rules") & Sunderland, "An Appraisal of English Procedure", 9 J. Am. Jud. Soc. 164, 165 (1926) ("Summary judgment procedure ... is nothing but a process for the prompt collection of debts. ... Machinery for that purpose must provide a test to determine that the plaintiff has a debt and not a controverted claim, and a means for getting an immediate judgment without the expense and delay of a trial. The English practice does both of these things with neatness and dispatch").

introduced a streamlined civil process for the resolution of a small number of specified actions⁷¹ the outcome of which could be safely predicted or, in other words, was obvious.⁷²

B. Summary Judgment May Be Granted if the Ultimate Outcome Is Obvious

1. There Must Be a Marked Disparity Between the Strength of the Moving and Nonmoving Parties' Positions

[136] Summary judgment may be granted if the moving party discharges the legal or persuasive burden⁷³ and satisfies the court that the likelihood its position will prevail is very high and the likelihood that the nonmoving party will succeed is very low.⁷⁴ The disparity

⁷⁰ 18 & 19 Vict., c. 67.

⁷¹ See Bauman, "The Evolution of Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating's Act", 31 Ind. L.J. 329, 350 (1956) ("In actions on negotiable instruments, when plaintiff establishes his claim by the production of the instrument, and the defendant fails to attack its validity or substantiates any other defense, the court is justified in ordering judgment for the plaintiff"); Clark & Samenow, "The Summary Judgment", 38 Yale L.J. 423, 430 (1929) ("The [summary judgment moving party's] affidavit must be made by the plaintiff in person or by one with knowledge of the facts. ... The affidavit must verify the cause of action on the deponent's own knowledge and must contain a statement of belief that the defendant has no defence") & Sunderland, "An Appraisal of English Procedure", 9 J. Am. Jud. Soc. 164, 165 (1926) ("Summary judgment procedure, in essence, is nothing but a process for the prompt collection of [uncontroverted] debts").

⁷² Bauman, "The Evolution of Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating's Act", 31 Ind. L.J. 329, 350 (1956) ("The remedy [of summary judgment] must be restricted to cases where the court may safely determine even in the absence of demeanor evidence that the plaintiff is entitled to judgment without a trial").

⁷³ *Access Mortgage Corp. (2004) v. Arres Capital Inc.*, 2014 ABCA 280, ¶ 45, 584 A.R. 68, 78 ("the legal or persuasive burden rests on the moving party"); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 66, 35 R.P.R. 5th 105, 131 ("the nonmoving party has no legal or persuasive burden to discharge. ... In some circumstances the nonmoving party may be at risk of losing the summary judgment application if it fails to present a version of the facts which is inconsistent with that relied on by the moving party") & 2 W. Stevenson & J. Côté, *Civil Procedure Encyclopedia* 31-8 (2003) ("The legal onus remains throughout on the party seeking summary judgment to show that he has met the standard of proof for judgment"). See also *Canada v. Lameman*, 2008 SCC 14, ¶ 11; [2008] 1 S.C.R. 372, 378 (on a summary judgment application each side "must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried"); *Puolitaipale Estate v. Grace General Hospital*, 170 Man. R. 2d 32, 33 (C.A. 2002) ("Once the moving party has crossed the threshold and moved the ball into the respondent's court, it is time for the respondent to put his or her 'best foot forward'"); *1061590 Ontario Ltd. v. Ontario Jockey Club*, 231 O.R. 3d 547, 557 (C.A. 1995) ("a respondent on a motion for summary judgment must lead trump or risk losing") & *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) per Harlan, J. (the nonmoving party declines to lead evidence at its own peril).

⁷⁴ *898294 Alberta Ltd. v. Riverside Quays Ltd. Partnership*, 2018 ABCA 281, ¶ 12; *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 2014, ¶ 2, 20 C.P.C. 8th 43, 46-47; *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153, ¶ 15, 17 C.P.C. 8th 252, 255; *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160, ¶ 2, 100 C.P.C. 7th 52, 61; *Talisman Energy Inc. v. Questerre Energy Corp.*, 2017 ABCA 218, ¶ 18, 57 Alta. L.R. 6th 19, 29; *Baim v. North Country Catering Ltd.*, 2017 ABCA 206, ¶ 12; *Condominium Corp. No. 032 1365 v. Cuthbert*, 2016 ABCA 46, ¶ 27, 612 A.R. 284, 289; *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12, ¶ 19; 776826

between the strength of the positions of the moving and nonmoving parties' must be so marked that the ultimate outcome of the dispute is obvious – the likelihood that a court will ultimately adopt the moving party's position is many times greater than the likelihood it will favor the nonmoving party's position.⁷⁵

[137] I have stated before that⁷⁶ “the comparative strengths of the moving and nonmoving parties' positions need not be so disparate that the nonmoving party's prospects of success must be close to zero before summary judgment may be granted. If that was the law, the purpose of summary judgment would be frustrated”.

[138] To be clear, the moving party does not have to establish that the likelihood the court will adopt its position at trial is close to 100 percent so that the outcome is beyond doubt.⁷⁷ The corollary of this proposition is that the nonmoving party may not survive a summary judgment motion by showing that its prospects of success are marginally better than extremely low.

[139] Most jurisdictions are prepared to deprive the nonmoving party of access to the full civil procedure spectrum only if the disparity between the strengths of the moving and nonmoving parties' positions is so great that the likelihood the moving party's position will prevail is very high – the ultimate trial disposition is obvious. This marked disparity element is produced by the employment of tests that ask if the nonmoving party's position is devoid of merit or if there is a genuine issue to be tried. If the nonmoving party's position is without merit, there is no genuine issues to be tried.⁷⁸

Alberta Ltd. v. Ostrowercha, 2015 ABCA 49, ¶ 13, 593 A.R. 391, 395; *W.P. v. Alberta*, 2014 ABCA 404, ¶ 26, 378 D.L.R. 4th 629, 642; *Access Mortgage Corp. (2004) v. Arres Capital Inc.*, 2014 ABCA 280, ¶¶ 45 & 46, 584 A.R. 68, 78; *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626, ¶ 60; *Quinney v. 1075398 Alberta Ltd.*, 2015 ABQB 452, ¶ 39, 24 Alta. L.R. 6th 202, 214; *Rohit Land Inc. v. Cambrian Strathcona Properties Corp.*, 2015 ABQB 375, ¶ 48, [2015] 12 W.W.R. 728, 744; *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120, ¶ 51, 40 C.L.R. 4th 187, 208-09; *Nipshank v. Trimble*, 2014 ABQB 120, ¶ 14, 8 Alta. L.R. 6th 152, 158-59; *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 29, 587 A.R. 16, 26; *Deguire v. Burnett*, 2013 ABQB 488, ¶ 22, 36 R.P.R. 5th 60, 69; *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, ¶ 38, 18 B.L.R. 5th 73, 91; *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 61, 35 R.P.R. 5th 105, 129 & *Hari v. Bariana*, 2015 ABQB 605, ¶ 80 (Master).

⁷⁵ *Stout v. Track*, 2015 ABCA 10, ¶ 48 & n. 65, 62 C.P.C. 7th 260, 278 & n. 65 per Wakeling, J.A. (there is a marked disparity if the moving party's likelihood of success is at least four times greater than that of the nonmoving party).

⁷⁶ *Id.* at ¶ 50, 62 C.P.C. 7th at 279.

⁷⁷ *Id.* at n. 66, 62 C.P.C. 7th at n. 66.

⁷⁸ *Id.* at ¶ 2, 62 C.P.C. 7th at 265 (“if there was no genuine issue for trial, there would be no merit to the claim”).

[140] This demanding standard ensures that the desire to be efficient does not deprive the nonmoving party of the right to fairly advance its position.⁷⁹

[141] A leading civil procedure scholar observed in his text, Zuckerman on Civil Procedure, that “English law has evolved a summary judgment procedure for enabling litigants with a clear and unanswerable case to obtain judgment without having to negotiate the normal procedural hurdles”.⁸⁰

⁷⁹ *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶ 2, 20 C.P.C. 8th 43, 46-47 (“[the summary judgment test] is an onerous standard and rightly so. A grant of summary judgment ends a dispute without affording the litigants full access to the civil procedure spectrum”); *Nipshank v. Trimble*, 2014 ABQB 120, ¶ 14, 8 Alta. L.R. 6th 152, 159 (“The reason this is preferable is that it not only states the high threshold which an applicant must meet for obtaining summary judgment, but also contains within it the rationale for granting summary judgment and depriving the respondent of full access to all litigation tools”); *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 29, 587 A.R. 16, 26 (“neither [litigants nor the administration of justice] are ... served when summary judgment is used to prematurely extinguish a potentially meritorious claim or defence for the sake of economy”); *Kary Investment Corp. v. Tremblay*, 2003 ABQB 315, ¶ 21 (“To be just, the [summary judgment] applicant must establish, beyond a reasonable doubt, that there is no real dispute in law or fact. The standard must be set that high because a successful application for summary judgment will deprive the other party of the right to have matters determined following a full trial of all the issues”); *Rai v. 1294477 Alberta Ltd.*, 2015 ABQB 349, ¶ 21, 618 A.R. 220, 224 (Master) (“Depriving a civil litigant of full participation in the civil legal process ... requires a high standard, though not necessarily as high as the criminal standard”); *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221, ¶ 44 (“The bar on a motion for summary judgment is high”); *Weyburn Security Bank v. Martin*, 22 D.L.R. 689, 690 (Sask. Sup. Ct. 1915) (“summary jurisdiction ... must be used with great care; that a defendant ought not to be shut out from defending unless it is very clear that he has no defence”); *Swain v. Hillman*, [2001] 1 All E.R. 91, 96 (C.A. 1999) per Judge L.J. (“To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step”); *Jacobs v. Booth Distillery Co.*, 85 L.T.R. 262, 262 (H.L. 1901) (“People do not seem to understand that the effect of Order XIV. is, that, upon the allegation of the one side ..., a man is not to be permitted to defend himself in a court; that his rights are not to be litigated at all”); *Spencer v. Australia*, [2010] HCA 28, ¶ 24, 241 C.L.R. 118, 131 per French, C.J. & Gummow, J. (“The exercise of powers to summarily terminate proceedings must always be attended with caution”); *Agar v. Hyde*, [2000] HCA 41, ¶ 57, 201 C.L.R. 552, 575-76 (“Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes”); *General Steel Industries Inc. v. Commissioner for Railways*, [1964] HCA 69, ¶ 10, 112 C.L.R. 125, 130 per Barwick, C.J. (“great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal”); *Australian Securities and Investment Commission v. Cassimatis*, 2013 FCA 641, ¶ 50, 302 A.L.R. 671, 686 (“while s 31A [of the *Federal Court of Australia Act 1976*] sets a lower bar, or a softened test, for the summary determination of proceedings, any such summary determination still has to be approached with caution. This is so because a trial is the usual and accepted means by which disputed questions of fact are determined in this country”); & *Whitaker v. Coleman*, 115 F. 2d 305, 307 (5th Cir. 1940) (“[summary judgment is not designed as] a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial”).

⁸⁰ A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* 378 (3d ed. 2013). See also *Argyle UAE Ltd. v. Par-La-Ville Hotel and Residences Ltd.*, [2018] EWCA Civ 1762, ¶ 54 per Flaux, L.J. (“In circumstances where the appellants have not put forward any case as to why they should be entitled to retain the monies as against

[142] The modern standard for the evaluation of summary judgment claims has not changed since the Westminster Parliament passed the 1855 *Summary Procedure on Bills of Exchange Act*⁸¹ and allowed the *bona fide* holders of dishonoured bills of exchange and promissory notes to secure summary judgment and avoid the necessity of contending with “frivolous or fictitious defences”.⁸²

[143] This is also the law in Australia, New Zealand and the United States.

[144] In *Rich v. CGU Insurance Ltd.*⁸³ Chief Justice Gleeson and Justices McHugh and Gummow of the Australian High Court opined that “issues raised in proceedings are to be

Argyle, the judge was quite right to grant summary judgment [for unjust enrichment] against them”); *Chief Constable of Greater Manchester Police v. Carroll*, [2017] EWCA Civ 1992, ¶ 60 per Sir Terence Etherton, M.R. (“It cannot be said that the claim [of the nonmoving party] is so weak ... that it could be ... dismissed on summary judgment”); *Swain v. Hillman*, [2001] 1 All E.R. 91, 94 per Lord Woolf, M.R. (C.A. 1999) (“If a claimant has a case which is bound to fail, then it is in the claimant’s interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible”); *Jacobs v. Booth’s Distillery Co.*, 85 L.T.R. 262, 262 (H.L. 1901) per Lord Chancellor Halsbury (“There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV. was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights”) & per Lord James (“[a court should grant summary judgment] only when it can say to the person who opposes the order, ‘You have no defence’”); *Jones v. Stone*, [1894] A.C. 122, 124 (P.C.) (W. Austl.) (“it is abundantly clear to their Lordships that there are very serious questions of fact in debate which never ought to have been determined in a summary manner under Order XIV. ... [Summary judgment is] intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay”); I. Jacob, P. Adams, J. Neave & K. McGuffie, *The Supreme Court Practice* 1967, at 113 (“Actions for damages for negligence are suitable for procedure under 0.14 only if it is clearly established that there is no defence as to liability”) & G. King & W. Ball, *The Annual Practice* 1926, at 153 (“The purpose of 0.14 is to enable a plaintiff suing by writ, specially indorsed under 0.3, r. 6, to obtain summary judgment without trial, if he can prove his claim clearly; and if the defendant is unable to set up a *bona fide* defence, or raise an issue against the claim which ought to be tried”).

⁸¹ 18 & 19 Vict., c. 67. See Bauman, “The Evolution of Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating’s Act”. 31 Ind. L.J. 329 (1956) & Clark & Samenow, “The Summary Judgment”, 38 Yale L.J. 423 (1929).

⁸² 18 & 19 Vict., c. 67, recital.

⁸³ [2005] HCA 16, ¶ 18, 214 A.L.R. 370, 375. See also *General Steel Industries Inc. v. Commissioner for Railways*, [1964] HCA 69, ¶ 8, 112 C.L.R. 125, 129 per Barwick, C.J. (“the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action ... is clearly demonstrated”); *Dey v. Victorian Railway Commissioners*, [1949] HCA 1, 78 C.L.R. 62, 91 per Dixon, J. (“A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court”); *Palermo v. National Australia Bank Ltd.*, [2017] QCA 321, ¶ 70 (“a case for summary judgment is one where it is clear that a trial is unnecessary, and that is it better to end the proceedings, than to proceed to a contest. ... This approach is consistent with the UK legislation on which the rule was modelled”) & *Shaw v. Deputy Commissioners of Taxation*, [2016] QCA 275, ¶ 31 (the Court adopted Lord Woolf’s test in *Swain v. Hillman*).

determined in a summary way only in the clearest of cases”. Another High Court judgment delivers the identical message:⁸⁴ “The test to be applied has been expressed in various ways, but all ... are intended to describe a high degree of certainty about the ultimate outcome of the proceedings if it were allowed to go to trial in the ordinary way”.

[145] The New Zealand High Court recently declared that summary judgment is appropriate if a court is “left without any real doubt or uncertainty”⁸⁵ about the frailties of the nonmoving party’s position.

[146] The United States Supreme Court holds a similar view. In *Anderson v. Liberty Lobby, Inc.*,⁸⁶ Justice White, writing for the Court, succinctly stated that summary judgment is appropriate if the case is “so one-sided that one party must prevail at trial as a matter of law”. Justice Rehnquist, in *Celotex Corp. v. Catrett*,⁸⁷ noted that summary judgment may be granted to “dispose of factually unsupported claims or defences”.

[147] This high summary judgment standard does not now and has never meant that the court has jettisoned the appropriate standard of proof in a civil case – the plaintiff must prove the facts that are essential under the applicable legal test on a balance of probabilities. No court hearing a summary judgment application and imposing a high threshold such as I favor has ever suggested that it is necessary to alter the rules of the game. There is only one standard of proof in Canada for civil proceedings – the claimant must prove the essential facts of its case on a balance of probabilities?⁸⁸ A high summary judgment standard simply means that a court

⁸⁴ *Agar v. Hyde*, [2000] HCA 41, ¶ 57, 201 C.L.R. 552, 576 per Gaudron, McHugh, Gummow & Hayne, JJ.

⁸⁵ *Bigyard Holdings Ltd. (in receivership) v. Tasmandairy Ltd.*, [2017] NZHC 1918, ¶ 45. See also *Thompson v. Turner Hopkins*, [2018] NZCA 197, ¶ 8 (“Where a defendant applies for summary judgment, a defendant has to show that the plaintiff cannot succeed”) & *McKay v. Sandman*, [2018] NZCA 103, ¶¶ 91 & 92 (“In our view all the points of criticism have been aired and satisfactorily answered. Viewed realistically the allegation of dishonesty is without merit. ... Consequently we are satisfied that Mr Sandman could not establish at trial that the Firm’s actions ... were undertaken dishonestly”).

⁸⁶ 477 U.S. 242, 251-52 (1986).

⁸⁷ 477 U.S. 317, 323-24 (1986). See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (“Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial’”).

⁸⁸ *F.H. v. McDougall*, 2008 SCC 53, ¶¶ 40 & 49, [2008] 3 S.C.R. 41, 58 & 61 (“Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. ... In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred”); *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, 169 (“in civil litigation, the ... burden of proof ... [is] proof on a balance of probabilities”); *Scott v. Cresswell*, 56 D.L.R. 3d 268, 271 (Alta. Sup. Ct. App. Div. 1975) (“in civil cases ... the fact must be proved by a balance of probabilities”); *Steadman v. Steadman*, [1974] 2 All E.R. 977, 981 (H.L.) (“A thing is proved in civil litigation by shewing that it is more probably true than not”); *United States v. Schipani*, 289 F. Supp. 43, 55-56 (E.D.N.Y. 1968) (“[in] an ordinary civil case ... the trier must be convinced ... that the proposition is more probably true than false (50+% probable for purposes of this analysis)”) & Rothstein, Centa &

should not award final judgment before trial unless it is satisfied, after taking into account incontrovertible facts and law, that the disparity between the strength of the moving and nonmoving parties' cases is so marked that the trial result is obvious. Summary judgment is the product of judicial prognostication of ultimate trial outcome based on incontrovertible facts and law.⁸⁹

[148] It is also important to remember that summary judgment is not a trial.⁹⁰

[149] The fact that courts grant interim or interlocutory injunctions without asking whether the moving party's position is more likely to succeed than the nonmoving party's position does not translate into a new level of persuasion in civil disputes.⁹¹

[150] Suppose that a sophisticated corporate client asks litigation counsel for an opinion on the likelihood of ultimate success in a proposed complex civil action. Counsel has estimated that legal fees will exceed \$5 million. The client needs to know the prospects of success before making a final decision about suing a joint venture partner. Counsel informs the client that the likelihood a trial court will conclude that the client has proved the contested facts on a balance of probabilities is around 66⅔% – the client is twice as likely to succeed as the proposed defendant. The fact that the lawyer proffers an opinion as to the future trial disposition does not mean that the basic trial rules have changed. They obviously do not. The plaintiff cannot succeed unless it presents admissible evidence that allows the court to find that the plaintiff has proved the essential facts of its case on a balance of probabilities.

2. There Must Be an Incontrovertible Factual Foundation

a. Relevant Facts

Adams, "Balancing Probabilities: The Overlooked Complexity of the Standard of Proof" in The Law Society of Upper Canada, Special Lectures 2003: The Law of Evidence 459 (2004) ("Proof on a balance of probabilities is most often understood as requiring the adjudicator to determine that it is more likely than not that a disputed fact exists or occurred").

⁸⁹ *Three Rivers District Council v. Bank of England*, [2003] 2 A.C. 1, 260 (H.L. 2000) per Lord Hope ("In *Taylor v. Midland Bank Trust Co Ltd* 21 July 1999 [Stuart Smith L.J.] ... said that ... the court should look to see what will happen at the trial and that if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred").

⁹⁰ *Swain v. Hillman*, [2001] 1 All E.R. 91, 95 (C.A. 1999) per Lord Woolf, M.R. ("the proper disposal of an issue under [the summary judgment part] does not involve the judge conducting a mini-trial, that is not the object of the provisions") & *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) per White, J. ("at the summary judgment stage the judge's function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. ... [T]here is no issue for trial unless there is sufficient evidence favouring the nonmoving party for a jury to return a verdict for that party").

⁹¹ E.g., *RJR MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, 334 ("First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried").

[151] A summary judgment applicant must satisfy the court that the facts and the law on which the applicant relies make it highly unlikely that the nonmoving party's position will prevail.

[152] An assessment of likely trial outcomes cannot be made unless the material facts are incontrovertible.⁹²

[153] I will start with an example presented by Justice Brennan in *Anderson v. Liberty Lobby, Inc.*⁹³ that does not warrant summary judgment because the material facts are in dispute:

Imagine a suit for breach of contract. If ... the defendant moves for summary judgment and produces one purported eye witness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contact, while the plaintiff produces one purported eye witness who asserts that the parties did in fact come to terms, presumably that case would go to the jury.

[154] Here is an example of a fact pattern that warrants summary judgment because the facts are incontrovertible and the law is clear.⁹⁴

⁹² *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶ 3, 20 C.P.C. 8th 43, 48 (“An incontrovertible factual foundation is an essential element of a controversy ripe for summary adjudication”); *Mulholland v. Rensonnet*, 2018 ABCA 24, ¶ 1 (the Court upheld a chambers judge’s order dismissing a summary judgment application because the “three parties [were] all saying something different”); *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*, 2016 ABCA 331, ¶ 23 (“Summary judgment is not appropriate when *viva voce* evidence is needed, where the judge is required to weigh evidence or make findings of credibility”); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46, ¶ 28, 612 A.R. 284, 289 (“Summary judgment is not possible if opposing parties’ affidavits and evidence conflict on material facts because a chambers judge cannot weigh evidence or credibility on a summary judgment application”) (emphasis in original); *Charles v. Young*, 2014 ABCA 200, ¶ 4, 97 E.T.R. 3d, 1, 3 (“In our view, it was an error for the chambers judge to determine this matter simply on the basis of conflicting affidavits and documents that would support either party’s position”); *Kristal Inc. v. Nicholl and Akers*, 2007 ABCA 162, ¶ 12, 41 C.P.C. 6th 381, 386 (“We conclude ... that there is ... no genuine issue to be tried and no disputed facts which would warrant a trial”) & *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 16, 35 R.P.R. 5th 105, 114 (“The facts and the law on which the plaintiff rely are incontrovertible”).

⁹³ 477 U.S. 242, 267 (1986). See also *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 68, 35 R.P.R. 5th 105, 133 (“if, in the promissory note example, B swore in an affidavit that she repaid A in accordance with the terms of the promissory note and produced a receipt signed by A, the motions court would be required to dismiss A’s summary judgment application”).

⁹⁴ See *O’Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, ¶ 57, 18 B.L.R. 5th, 73, 98 (“Through the affidavits of each of Messrs. Oborowsky and Fath the plaintiffs have established the essential elements of their claims. They proved that the defendants are the makers of the O’Hanlon and Waiward instruments and that they have not paid the sums due under them. The plaintiffs did not have to demand payment [of the promissory notes] before commencing these actions. The defendants are jointly and severally liable. ... The applicable law states that the payee of a dishonoured promissory note may sue for payment of the notes and

[155] A files an affidavit swearing that on January 1, 2017 his brother B borrowed \$1 million from A and promised to pay A on January 1, 2018 \$1 million plus ten percent interest. The affidavit also claims that A signed a promissory note dated January 1, 2017 documenting the terms of the loan and that B has failed to repay A. B files no affidavit and does not cross-examine A.⁹⁵

[156] A requirement of an incontrovertible factual foundation does not mean that the nonmoving party may effectively block a summary judgment order by denying, without any objective basis, the existence of an essential fact.⁹⁶ A court must carefully review the affidavit evidence in order to determine whether there exists a core set of indisputable facts. There may be agreements or letters that neither party denies were signed or delivered.⁹⁷ By comparing them with allegations not in accord with this core set of indisputable facts, an adjudicator may determine whether the likelihood the factual allegations of the moving party are sustainable is very high.⁹⁸ If the likelihood that the facts relied on by the moving party exist is very high, there is an incontrovertible factual foundation.

interest. ... The defendants have led no evidence to support and the questioning of Messrs. Oborowsky and Fath produced no admissions which supported the position the defendants took in their defences”).

⁹⁵ Common law courts have frequently given summary judgment to enforce promissory notes. E.g., *O’Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, 18 B.L.R. 5th 73; *Dushenski v. Lymer*, 2010 ABQB 605, 500 A.R. 48; *HSBC Bank of Canada v. Vallet*, 2009 ABQB 743, 483 A.R. 240; *State Bank of Butler v. Banzanson*, 16 D.L.R. 848 (Alta. Sup. Ct. 1914); *Bank of Montreal v. Mangold*, 86 A.R. 215 (Master 1988); *Stolberg Mill Construction Ltd. v. Selkirk Spruce Mills Ltd.*, 22 W.W.R. 605 (B.C. Sup. Ct. 1957); *Butkowsky v. Jalbuena*, 132 D.L.R. 3d 177 (B.C. Co. Ct. 1982); *Heaman v. Schnurr*, 2011 ONSC 2661; *Quick Credit v. 1575463 Ontario Inc.*, 2010 ONSC 7227; *Fierro v. Sinclair*, 2012 NSSC 429; *Fielding & Platt Ltd. v. Najjar*, [1969] 1 W.L.R. 357 (C.A.); *Griffon V, LLC v. 11 East 36th LLC*, 934 N.Y.S. 2d 472 (App. Div. 2011); *Federal Deposit Insurance Corp. v. Willis*, 497 F. Supp. 272 (S.D. Ga. 1980); *Nonneman v. Murphy*, 2012 Bankr. Lexis 4264 (Bankr. Ct. E.D. Ky.) & *Wells Fargo Bank N.A. v. Ortega*, 2012 WL 3570734 (10th Cir.).

⁹⁶ *Acess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626, ¶ 62 (“summary judgment is not precluded just because affidavits conflict. Decision makers have some latitude for fact-finding and assessing the chance of success at trial in the face of conflicting affidavit evidence – if *the record* provides a foundation for substantially discounting the probative value of a party’s claim”) (emphasis in the original) & *McKay v. Sandman*, [2018] NZCA 103, ¶ 30 (“While summary judgment is inappropriate where there are factual disputes or where the courts must determine material facts independently of affidavit evidence, the court may disregard factual disputes which are plainly spurious or contrived”).

⁹⁷ *Three Rivers District Council v. Bank of England*, [2003] 2 A.C. 1, 261 (H.L. 2000) per Lord Hope (“it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based”).

⁹⁸ E.g., *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 92, 35 R.P.R. 5th 105, 141-42 (the Court carefully reviewed the documents before concluding that the plaintiff did not repudiate the settlement agreement; the Court ordered specific performance in a summary judgment) & *Haji-Hamzeh v. Wawanese Mutual Insurance Co.*, 2005 MBCA 17, ¶ 4, 192 Man. R. 2d 154, 155 (“Normally issues of credibility are not resolved on a motion

[157] Suppose that in the promissory note example B filed an affidavit stating that he repaid A the agreed-upon sum on December 31, 2017 and that A provided him with a receipt. B does not attach the receipt to his affidavit. A filed an affidavit of C, A and B's mother, in which she states that B sent her an email on December 30, 2017 stating that B owed A \$1 million and had no money to repay A and asked her to pay A \$1 million to extinguish B's debt to A, a request she denied. On cross-examination, B admits that he sent his mother the December 30, 2017 email and that she refused his request. B maintains his position that he has repaid the sum due but cannot present the receipt and refuses to say where he found the money to repay A.

[158] A court would not have any trouble concluding that there is an incontrovertible factual basis that supports A's application for summary judgment enforcing B's promissory note. It is undeniable that A lent B \$1 million and that B signed a promissory note confirming the debt and his obligation to repay. Also indisputable is the existence of B's conversation with his mother and B's failure to produce a receipt. The likelihood that B repaid the \$1 million he owes A is extremely low – somewhere around zero.

[159] *898294 Alberta Ltd. v. Riverside Quays Ltd. Partnership*,⁹⁹ a very recent decision of this Court, illustrates the degree of scrutiny that is appropriate in assessing the presence of an incontrovertible factual foundation. Pursuant to an oral agreement, 898294 Alberta Ltd. lent Riverside Quays \$183,750 with no particular repayment terms. Riverside Quays recorded its debt to 898294 Alberta Ltd. in its financial records and repaid 898294 Alberta Ltd. \$10,699.66 in March 2009. 898294 Alberta Ltd. demanded repayment from Riverside Quay in 2015 and commenced an action seeking judgment for the outstanding debt. The plaintiff applied for summary judgment. The defendant argued that the debt the plaintiff sought to recover was payable to the Statesman Group of Companies Ltd. and relied on an affidavit filed by the chief financial officer of Statesman in an earlier proceeding in which he asserted that Riverside Quays' debt to Statesman included the sum 898294 Alberta lent to Riverside Quays. There was no objective support for this assertion. This Court responded as follows:¹⁰⁰

Nor is 898 bound by any evidence given by Kevin Ingalls on behalf of Statesman, no matter what his position with 898 was. It appears that in 2013 Mr. Ingalls was merely a shareholder of 898 along with dozens of other employees of Statesman and their spouses. He was also an officer and director of 898 but he did nothing which would bind the shareholders of 898.

for summary judgment, but in certain instances the evidence may be so overbalanced in one direction that the 'so-called credibility issue evaporates''').

⁹⁹ 2018 ABCA 281. See also *Argyle UAE Ltd. v. Par-La-Ville Hotel and Residences Ltd.*, [2018] EWCA Civ 1762, ¶ 23 (the Court upheld a summary restitution judgment of \$12.5 million US ignoring the defendants' unsubstantiated claims that the sums involved were paid as director loans).

¹⁰⁰ 2018 ABCA 281, ¶ 26.

[160] *Composite Technologies Inc. v. Shawcor Ltd.*¹⁰¹ also warrants review. Shawcor and the other defendants successfully moved for summary judgment dismissing the plaintiffs' claims. One plaintiff, Proflex Pipe, had been struck off the corporate registry and its action was clearly a nullity. The defendants also successfully argued that Composite Technologies Inc. had sold its intellectual property in composite flexible pipe to Proflex Pipe before the purchaser was struck off the registry and had no property interest to protect. Both the chief executive officer and the vice-president finance of the two plaintiffs – the contracting parties to the technology transfer agreement on which the defendants relied – denied that Composite Technologies had given up its interest in the flexible composite pipe technology by signing the technology transfer agreement. This Court clearly rejected these assertions:¹⁰²

Taking into account... the text of the whole document, the purpose accounting for the technology transfer agreement and the business environment in which it would operate, we unhesitatingly conclude that Composite Technologies transferred to Proflex Pipe any interest it had in the issued and pending patents described in schedule A, any interest it may have in future patents relating to flexible composite pipe technology and any other proprietary information not protected by the issued or pending patents disclosed in schedule A... . This is a comprehensive sale on the part of Composite Technologies.

There is no other plausible interpretation of the text.

This inescapable interpretation of the technology transfer agreement, by itself, completely undermines the position of Composite Technologies.

b. Irrelevant Facts

[161] A contest regarding a fact that has no impact on the outcome of a summary judgment application is of no consequence.¹⁰³

[162] In *Can v. Calgary Police Service*¹⁰⁴ this Court upheld the motion court's decision summarily dismissing the plaintiff's action against members of the Calgary Police Service for wrongful arrest, false imprisonment and negligent investigation. The plaintiff challenged the arrestor's claim that he relied on a particular piece of evidence before he made the decision to

¹⁰¹ 2017 ABCA 160, 100 C.P.C. 7th 52.

¹⁰² Id. at ¶¶ 116-18, 100 C.P.C. 7th at 95-97.

¹⁰³ *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 68, 35 R.P.R. 5th 105, 133 ("a controversy over nonmaterial facts ... is irrelevant") & *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment").

¹⁰⁴ 2014 ABCA 322, 315 C.C.C. 3d 337.

order the plaintiff's arrest. This Court concluded that this dispute was irrelevant. There was ample evidence without considering the contested item to justify the conclusion that the warrantless arrest was lawful.¹⁰⁵

3. A Summary Judgment Application May Be Delayed To Allow a Party To Question the Moving Summary Judgment Party if Denying the Right To Question Would Cause Unreasonable Litigation Prejudice

[163] As a general rule any application by the nonmoving summary judgment party to seek access to a part of the civil process that has not yet been utilized and has the effect of forestalling the adjudication of the summary judgment application should be dismissed.¹⁰⁶ Such an application introduces delay and additional costs and undermines the purpose of the summary judgment protocol.¹⁰⁷

[164] For example, an order allowing the nonmoving summary judgment party to question the moving party may introduce considerable delay. The nonmoving party, once given the opportunity to question the moving party, has no incentive to expedite the discovery process. And if one side is given the right to question, the other may conclude that it should as well.

[165] But the value summary judgment represents in a modern civil procedure system – expeditious resolution of a dispute – does not justify abridgment of the civil process if the nonmoving summary judgment party can demonstrate that denying it access to a portion of the civil process would cause it unreasonable litigation prejudice.¹⁰⁸

¹⁰⁵ Id. at ¶¶ 11 & 166, 315 C.C.C. 3d 337, 356 & 424.

¹⁰⁶ E.g., *McDonald v. Sproule Management GP Ltd.*, 2018 ABCA 295 (the Court upheld the chambers judge's decision denying the employer-defendant the right to question the plaintiff-employee before the hearing of a summary judgment application). See *Federal Rules of Civil Procedure* 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the Court may ... allow time ... to take discovery").

¹⁰⁷ *Walia v. University of Manitoba*, 2005 MBQB 278, ¶ 16 (Master) ("To not allow the summary judgment hearing to proceed, and to allow the pre-trial procedures to run their course, defeats the purpose of the summary judgment relief"). See Cavanagh, "Matsushita at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?", 82 Antitrust L.J. 81, 114 (2018) ("Discovery costs, already substantial in antitrust cases, are pushed even higher as the parties position themselves for summary judgment. ... [S]ummary judgment motions take time for the parties to prepare and for the courts to decide").

¹⁰⁸ See *General Steel Industries Inc. v. Commissioners for Railways*, [1964] HCA 69, ¶ 10, 112 C.L.R. 125, 130 per Barwick, CJ. ("great care must be exercised to ensure that under the guise of achieving expeditious finality, a party is not deprived of the opportunity for the trial of their case"); *Can v. Calgary Police Service*, 2014 ABCA 322, n. 30, 315 C.C.C. 3d 337, n. 30 per Wakeling, J.A. ("There may be some exceptional cases where it is appropriate to adjourn a summary judgment application to allow for questioning"); Nova Scotia's *Civil Procedure Rules*, r. 13.04(6)(b) ("A judge who hears a motion for summary judgment on evidence has discretion to ... adjourn

[166] This is not an easy burden to discharge.¹⁰⁹ While it is fair to say that any party deprived of the right to question is prejudiced, this alone does not constitute unreasonable prejudice. The party who seeks the opportunity to question must identify other reasons that explain why the opportunity to cross-examine the moving party's deponents and to present its own affidavit evidence does not allow the nonmoving party to fairly answer the allegations of the moving party.¹¹⁰

[167] The nonmoving summary judgment party may be unreasonably prejudiced if there is reason to believe that the moving party alone has access to the relevant information that directly relates to the merits of the dispute between the parties.¹¹¹ The moving party may be seeking summary judgment to forestall discovery.

the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence") & *Federal Rules of Civil Procedure* 56(f): ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just").

¹⁰⁹ *Canada v. Lameman*, 2008 SCC 14, ¶ 19, [2008] 1 S.C.R. 372, 382 ("A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed"); *Poliquin v. Devon Canada Corp.*, 2009 ABCA 216, ¶ 70, 454 A.R. 61, 80 ("Courts should not deny summary judgment on the off-chance that a party might, were there to be a trial, present evidence refuting what are undisputed facts at the summary judgment hearing"); *Brown v. Northey*, 1991 ABCA 75, ¶ 11, 115 A.R. 321, 324 ("It is not enough ... merely to argue that there may be facts somewhere which might emerge at trial and might turn out to be relevant"); *Papaschase Indian Band No. 136 v. Canada*, 2004 ABQB 655, ¶ 55, [2005] 8 W.W.R. 442, 475 ("A plaintiff responding to a summary dismissal application cannot simply rely on its pleadings and bare allegations of a cause of action, or argue that evidence might turn up later"); *Suncor Inc. v. Canadian Wire and Cable Ltd.*, 7 Alta. L.R. 3d 182, 185-86 ("If a ... [respondent] wishes the trial of an action merely in the ... [hope] that a discovery and trial will, by luck, produce some evidence that aids it (although it does not know at the time of the summary judgment application what it would hope to prove through that evidence), summary judgment should be granted against it"); *Transamerica Life Insurance Co. v. Canada Life Assurance Co.*, 28 O.R. 3d 423, 434 (Gen. Div. 1996) ("It is clearly established that on a motion for summary judgment a party is no longer entitled to sit back and rely on the possibility that more favourable facts may develop at trial"); *Sterling Lumber Co. v. Harrison*, 2010 FCA 21, ¶ 8 ("the principle that parties ... must put their best foot forward precludes the respondents from saying that other evidence may be adduced at trial that contradicts Mr. Harrison's statement against interest"); *Engel v. Aetna Life Insurance Co.*, 139 F. 2d 469, 473 (2d Cir. 1943) (the court confirmed summary judgment because "we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at trial she may produce further evidence") & *Apsley v. Boeing Co.*, 722 F. Supp. 2d 1218, 1231 (D. Kan. 2010) ("a party must do more than simply claim that discovery is incomplete").

¹¹⁰ *Papaschase Indian Band No. 136 v. Canada*, 2004 ABQB 655, ¶ 57, [2005] 8 W.W.R. 442, 476 ("The respondent [to a summary judgment application] is not without weapons, as it is allowed to cross-examine on the applicant's affidavit and file a conflicting affidavit") & *Loeppky v. Taylor McCaffrey LLP*, 2015 MBCA 83, ¶ 4 ("any potential prejudice to the plaintiffs can be overcome by way of cross-examination").

¹¹¹ *Trustee v. P. Burns Resources Ltd.*, 2015 ABCA 390, ¶ 8, 79 C.P.C. 7th 29, 32 ("Where the nature of the action is such that much of the evidence supporting the cause of action is likely to be in the sole possession of the

[168] Suppose that A Co. purchases from B all B's shares in B Co. for \$25 million. B has exceptional skills doing X. B is the only person in the world who can do X. The purchase-and-sale agreement obliges B to work for B Co. doing X as an employee for not less than five years and for a stipulated ten-year period not to assist in any manner or have an interest in any business that competes with B Co.¹¹² B Co. does business worldwide. Shortly after A Co. has paid B, Texas customers of B Co. notify B Co. that a sales representative for D Co. has offered to do X. A Co. cannot immediately determine who owns D Co. It is convinced that B is the directing mind of D Co. A Co. confronts B. B falsely claims that he has never heard of D Co., that he has no interest in it and that he is not competing with B Co. B has used the money A Co. paid him to purchase property in Alberta, construct a large tool shop and order the special equipment needed to manufacture the tools necessary to do X. A Co. receives more reports from the field about D Co.'s appearance in the market. A Co. sues B and D Co. A Co. alleges that B has an interest in D Co. and is in breach of B's obligations under the purchase-sale agreement. B, convinced that A Co. cannot be aware of the full extent of his subterfuge, immediately applies for summary judgment falsely swearing in his affidavit that he has no interest in D Co. and is not competing with B Co. B Co. serves an appointment on B for questioning and B moves under r. 5.19 of the *Alberta Rules of Court* for a set-aside order. A Co. files an affidavit stating that B is the only person in the world who can do X; that D Co. is now offering to do X for customers of A Co. and that the deponent believes that B is the directing mind of D Co. This is an appropriate case to order questioning and, in effect, delay adjudication of B's summary judgment application.

[169] Or the only contest between the moving and the nonmoving party may be the amount of damages to which the moving party is entitled. The nonmoving party may be prejudiced if it is unable to question the moving party about the facts relevant to its damages claim.¹¹³

C. *Hryniak v. Mauldin Proclaims the Merits of Summary Judgment*

[170] *Hryniak v. Mauldin*¹¹⁴ is an important decision. It proclaims the merits of summary judgment, a protocol universally appreciated.¹¹⁵

defendants, the plaintiff is more likely to require access to disclosure of documents and questioning to be able to make full answer to any subsequent application for summary judgment") & *Papaschase Indian Band No. 136 v. Canada*, 2004 ABQB 655, ¶ 57, [2005] 8 W.W.R. 442, 476 ("There may be cases where the applicant is in such complete control of the records that it would be unfair not to have it discover documents before the application is heard"). See also *Easyair Ltd. v Opal Telecom Ltd.*, [2009] EWHC 339, ¶ 15 (Ch.) ("the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case").

¹¹² A noncompetition agreement in a sale-of-business contract is subject to a less rigorous test of reasonableness than is used to evaluate a noncompetition agreement in an employment contract.

¹¹³ *Berscheid v. Federated Co-operatives Ltd.*, 2018 MBCA 27, ¶ 26, 421 D.L.R. 4th 315, 324 (the nonmoving party admitted the cattle supplements it sold the moving party were defective and that it breached its contract with the moving party; but discovery was necessary to ascertain the facts that are the foundation for a damage claim).

[171] Recognizing a trend that started in 1855 with the Westminster Parliament's passage of *The Summary Procedure on Bills of Exchange Act*¹¹⁶ and that has gained momentum with each passing decade and the observable increase in the cost of litigation and the time it consumes,¹¹⁷ the Supreme Court of Canada declared its unequivocal support for summary judgment.¹¹⁸ In doing so, the Supreme Court followed the lead of the House of Lords,¹¹⁹ the English Court of Appeal¹²⁰ and the United States Supreme Court.¹²¹

¹¹⁴ 2014 SCC 7, ¶¶ 2 & 3, [2014] 1 S.C.R. 87, 92 & 93.

¹¹⁵ *Can v. Calgary Police Service*, 2014 ABCA 322, ¶¶ 73-75, 315 C.C.C. 3d 337, 370-78 per Wakeling, J.A. & *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52, ¶ 7, 68 C.P.C. 7th 267, 269.

¹¹⁶ 18 & 19 Vict., c. 67.

¹¹⁷ For some time the high cost of litigation and the delays associated with it have caused disputants to seek other forms of redress outside the public court system. They may turn to private mediation or arbitration. Or they may pursue expedited litigation alternatives that are components of a modern public civil process. The factors that make the traditional litigation model unattractive may be directly attributable to the increased level of complexity of actions. There is a direct correlation between the complexity of an action and its costs. The more complex a matter is the more time lawyers must devote to identify the issues and develop the best arguments to resolve these issues in the client's favor. Most lawyer's fees are a product of time spent on a client's file. Complex matters frequently require the retention of experts. Experts are usually expensive. In addition, complex actions make increased demands on a client's time. Clients must spend more time in discoveries and in the affidavit-drafting process. All of these factors have a cumulative impact on the time frame an action is a live file. See generally, Report of the Canadian Bar Association Task Force on Systems of Civil Justice 15-16 (1996). These factors no doubt contribute to the declining percentage that conventional trials represent as the ultimate method by which disputes are resolved. Professor Galanter reports that the "portion of [American] federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline. More startling was the 60 percent decline in the absolute number of trials since the mid 1980s. ... The phenomenon is not confined to the federal courts; there are comparable declines of trials, both civil and criminal, in the state courts, where the great majority of trials occur. ... Although virtually every other indicator of legal activity is rising, trials are declining not only in relation to cases in the courts but to the size of the population and the size of the economy". "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", 1 J. Empirical Legal Stud. 459, 459-60 (2004). See also Twohig, Baar, Meyers & Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto 1973-1994" in 1 Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review* 77, 127 (1996) (trials declined both in absolute and percentage terms as the method of resolution from 1973 to 1994). Justice Bouck provides some insights into why in British Columbia delay is a problem. *Chu v. Chen*, 22 C.P.C. 5th 73 (B.C. Sup. Ct. 2002). Some have argued that the summary judgment device has directly contributed to the declining rate at which trial dispositions resolve disputes in American federal courts. Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", 1 J. Empirical Legal Stud. 459, 483 (2004) & Simmons, Jacobs, O'Malley & Tami, "The *Celotex* Trilogy Revisited: How Misapplication of the Federal Summary Judgment Standard Is Undermining the Seventh Amendment Right to a Jury Trial", 1 Fla. A & M.U.L. Rev. 1, 3 (2006).

¹¹⁸ I suspect that the percentage of court files resolved by a conventional trial judgment in Alberta has been in decline for over sixty years.

¹¹⁹ *Jacobs v. Booth's Distillery Co.*, 85 L.T.R. 262, 262 (1901) per Halsbury, L.C. ("There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV. was intended to put an

[172] To ensure that the benefits of summary judgment – “access to ... affordable, timely and just adjudication of claims”¹²² – were enjoyed, the Supreme Court directed courts to interpret summary judgment rules liberally.¹²³

[173] The endorsement of summary judgment by the world’s major common law jurisdictions makes sense. There are disputes that can be justly resolved without allocating to them the full array of the civil process. Parties to some disputes do not stand to derive a legitimate legal advantage from the time and expense associated with extensive discovery and trial processes. Delay does not qualify as a legitimate legal advantage. A debtor who has derived the benefits a promissory note represents but has not discharged his or her obligations under it for the simple reason that he or she is impecunious and has no defence to a claim for enforcement of the promissory note is a litigant who would derive no legitimate legal advantage from having access to the full panoply of the civil process.¹²⁴ On the other hand a party who has been victimized by an unscrupulous defendant who has destroyed and fraudulently created documents and camouflaged contract-breaking acts would undoubtedly derive a legitimate legal advantage from fully exploiting the benefits associated with discovery and trial cross-examination. Denying such a victim access to these important tools would accord a rogue defendant an unconscionable assist.

end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights”).

¹²⁰ *Swain v. Hillman*, [2001] 1 All E.R. 91, 92 & 94 (C.A.) (“Under r. 24.2, the court now has a very salutary power, both to be exercised in a claimant’s favour or, where appropriate, in a defendant’s favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. ... [Summary judgment] saves expense; it achieves expedition; it avoids the court’s resources being used up on cases where this serves no purpose”). Lord Woolf referred to the new civil procedure era as a “change in culture”. *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd.*, [1998] 2 All E.R. 181, 191 (C.A. 1997).

¹²¹ The United States Supreme Court delivered its strong endorsement of summary judgment in 1986. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (“The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action’”).

¹²² 2014 SCC 7, ¶ 5, [2014] 1 S.C.R. 87, 93.

¹²³ 2014 SCC 7, ¶ 5, [2014] 1 S.C.R. 87, 93. This direction is consistent with s. 10 of the *Interpretation Act*, R.S.A. 2000, c. I-8 (“An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best assures the attainment of its objects”) and r. 1.2(2)(b) of the *Alberta Rules of Court*, Alta. Reg. 124/2010 (“these rules are intended to be used ... to facilitate the quickest means of resolving a claim at the least expense”).

¹²⁴ See *Hussain v. Royal Bank of Canada*, 2017 ONCA 956, ¶ 4 (the Court dismissed a debtor’s appeal against a summary judgment order granted in the creditor bank’s favour noting that “[i]n oral submissions the appellant acknowledged that he owed the principal amounts claimed under the debt instruments”).

[174] This linkage between the characteristics of the dispute and the aspects of the civil process allocated to resolve it is a form of proportionality that appears in many walks of life. For example, health-care providers know that a patient who has a cold does not need to see an ear, nose and throat specialist. Someone with less training can tell the patient to rest and drink lots of water. It is poor management to assign a specialist tasks that other members of the health-care team with different skills could also perform and, as a consequence, to deprive other patients who would benefit only from the specialist's attention. And health-care providers know that a patient who presents with life-threatening burns requires a specialist's attention. In short, health-care providers attempt to align the skill sets of the health-care team with a patient's condition to optimize the use of everyone's training and skills without jeopardizing the patient's interests.

[175] The Supreme Court's strong endorsement of the merits of summary judgment squares with the commitment of Alberta courts to resolve disputes in the least amount of time practicable and at the lowest possible cost¹²⁵ and the direction that they do so in r. 1.2(2)(b) of the *Alberta Rules of Court*.¹²⁶ Alberta courts are cheerleaders for summary judgment and expedited dispute resolution generally.¹²⁷

[176] As noted above, Justice Brown, now of the Supreme Court of Canada, gave his imprimatur to the summary judgment principles that this opinion champions.¹²⁸

[177] Noteworthy is his and my conclusion¹²⁹ that *Hryniak v. Mauldin* does not have any effect on the summary judgment test in force in Alberta before the Supreme Court released *Hryniak v. Mauldin*.

¹²⁵ *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 76, 315 C.C.C. 3d 337, 373 per Wakeling, J.A. ("Alberta courts are dedicated to resolving disputes in the least amount of time practicable and at the lowest possible cost"); *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428, ¶ 34, 18 B.L.R. 5th 73, 88 ("Legislators in the United Kingdom, Canada and the United States have introduced summary judgment into their litigation model to ensure that dispute resolution takes place at the earliest point in the litigation continuum where it is just to do so"); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 71, 35 R.P.R. 5th 105, 134 ("[the] proper use [of summary judgment] expedites litigation, reduces costs for the litigants, frees up scarce judicial resources and ameliorates access to justice issues") & *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, ¶ 14, 371 D.L.R. 4th 339, 349 ("[the] principles stated in ... *Hryniak v. Mauldin* [regarding Ontario's r. 20] are consistent with modern Alberta summary judgment practice as set out [in r. 7.3 of the *Alberta Rules of Court*]").

¹²⁶ Alta. Reg. 124/2010 ("these rules are intended to be used ... to facilitate the quickest means of resolving a claim at the least expense").

¹²⁷ *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 77, 315 C.C.C. 3d 337, 374 per Wakeling, J.A. ("It can, without exaggeration, be asserted that the Supreme Court of Canada is preaching to the converted, if part of its target audience includes Alberta's superior courts") & *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351, ¶ 71, 35 R.P.R. 5th 105, 134 ("summary judgment is an important procedure which could be invoked more often than it is").

¹²⁸ *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 29, 587 A.R. 16, 26; *Nipshank v. Trimble*, 2014 ABQB 120, ¶ 14, 8 Alta. L.R. 6th 152, 158-59 & *Dequire v. Burnett*, 2013 ABQB 488, ¶ 22, 36 R.P.R. 5th 60, 69.

[178] *Hryniak v. Mauldin* has caused some of my colleagues to reject the world view on the summary judgment standard and to embrace a new less onerous standard that encourages judges to resolve disputes if they are satisfied that the moving party has proved its case on a balance of probabilities and that it is fair and just to decide the case summarily.

[179] I will explain in the next section why this Court must be faithful to the text of r. 7.3 of the *Alberta Rules of Court* and give the rule its plain and ordinary meaning as Alberta courts did before *Hryniak v. Mauldin*.¹³⁰

D. *Hryniak v. Mauldin* Has Not Altered the Text of Rule 7.3 of the *Alberta Rules of Court*, the Foundational Rules or the *Interpretation Act*

[180] While *Hryniak v. Mauldin* is indisputably an important decision, it is not a Swiss Army knife capable of almost anything. A Supreme Court of Canada judgment cannot amend the text of a constitutional statute or a rule of court and ignore the obvious meaning of a statute or a rule of court.

[181] This assertion is easy to illustrate.

[182] Suppose that Alberta's court rules bestowed the right to apply for summary judgment only on a plaintiff claiming to enforce a promissory note. Indeed, a defendant could not apply for summary judgment in Alberta until June 19, 1986.¹³¹

[183] The Supreme Court's enthusiastic support for summary judgment would not allow an Alberta court to grant summary judgment to a defendant even though the defendant had an iron-clad defence – the defendant paid the promissory note and has a receipt from the plaintiff witnessed by a priest and the plaintiff's mother, all of which is captured on video tape. If the court rules preclude granting a defendant summary judgment, a court cannot ignore the plain text. Nor could the plaintiff in a wrongful dismissal action secure from an Alberta court summary judgment. This is so regardless of the strength of the plaintiff's case. The assumed rule gives a court jurisdiction to grant summary judgment only if the plaintiff sues on a promissory note.

¹²⁹ 898294 *Alberta Ltd. v. Riverside Quays Ltd. Partnership*, 2018 ABCA 281, ¶¶ 12 & 27; *Whissell Contracting Ltd. v. City of Calgary*, 2018 ABCA 204, ¶¶ 2-3, 20 C.P.C. 8th 43, 46-48; *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153, ¶ 15, 17 C.P.C. 8th 252, 255; *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160, ¶ 2, 100 C.P.C. 7th 52, 61; *Ghost Riders Farm Inc. v. Boyd Distributors*, 2016 ABCA 331, ¶¶ 11 & 12; *Stout v. Track*, 2015 ABCA 10, ¶¶ 8 & 9, 62 C.P.C. 7th 260, 266 per Wakeling, J.A.; *Access Mortgage Corp. (2004) v. Arres Capital Inc.*, 2014 ABCA 280, ¶¶ 45 & 46, 584 A.R. 68, 78 & *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 104, 315 C.C.C. 3d 337, 388 per Wakeling, J.A.

¹³⁰ Supra note 4.

¹³¹ *Rules to Amend the Alberta Rules of Court*, Alta. Reg. 216/1986.

[184] *Hryniak v. Mauldin* has not altered the text of r. 7.3 or r. 1.2(2)(b) of the *Alberta Rules of Court*¹³² or Alberta's *Interpretation Act*.¹³³ Nothing in *Hryniak v. Mauldin* changed in any way the remedial interpretation focus.

[185] There is no valid reason to interpret r. 7.3 in a manner different from that accorded it by many panels of this Court before the publication of *Hryniak v. Mauldin*.¹³⁴

[186] Rule 20 of Ontario's *Rules of Civil Procedure* is fundamentally different from Alberta's r. 7.3.¹³⁵ A cursory reading of the two rules reveals this. The Supreme Court's interpretation of r. 20 could not affect Alberta's r. 7.3.

[187] The governing statutory principles are straightforward.

¹³² Alta. Reg. 124/2010 ("these rules are intended to be used ... to facilitate the quickest means of resolving a claim at the least expense").

¹³³ R.S.A. 2000, c. I-8, s. 10 ("An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects").

¹³⁴ *Berscheid v. Federated Co-operatives Ltd.*, 2018 MBCA 27, ¶ 32, 421 D.L.R. 4th 315, 325 ("The Supreme Court of Canada's decision in *Hryniak* did not alter the basic test for summary judgment in Manitoba. However, it did make courts acutely aware of the need to consider the concept of proportionality in all aspects of the justice system"); *Lenko v. Manitoba*, 2016 MBCA 52, ¶ 71, [2017] 1 W.W.R. 291, 311 ("*Hryniak* did not ... change the test to be applied on a motion for summary judgment in Manitoba. The test remains whether the claim or defence raises a genuine issue for trial (r. 20.03(1)). If there is a genuine issue for trial, it is not for the motion court to resolve that issue; rather the motion should be dismissed and the matter should proceed to trial. The situation is different in Ontario, where the summary judgment rules have been substantially amended to expand the role of the court in resolving claims without a trial. This difference must be kept in mind when applying *Hryniak* to a motion for summary judgment under the Manitoba Rules") & *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52, ¶ 6, 68 C.P.C. 7th 267, 269 ("*Hryniak v. Mauldin* ... has little bearing upon the circumstances, analysis, reasoning or result in this case. There, Justice Karakatsanis ... considered the application of a new Rule in Ontario (their Rule 20) which now empowers judges in that province to weigh the evidence, draw reasonable inferences from the evidence, and settle matters of credibility when deciding whether to grant summary judgment. Those powers are foreign to the well-established procedures and settled law which operate in Nova Scotia").

¹³⁵ *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 92, 315 C.C.C. 3d 337, 383 per Wakeling, J.A. ("Alberta's summary judgment protocol [is] dramatically different from Ontario's counterpart"); *Orr v. Fort McKay First Nation*, 2014 ABQB 111, ¶ 19, 587 A.R. 16, 22 (Ontario's Rule 20.04(2.1) provides for a process that is broadly comparable to an application under Alberta's civil procedure ... for judgment by way of summary trial under Rule 7.5"); *Jackson v. Canadian National Railway*, 2012 ABQB 652, ¶ 115, [2013] 4 W.W.R. 311, 362 ("[Rule 20 of Ontario's *Rules of Civil Procedure* is] significantly different from r. 7.3(1) of the *Alberta Rules of Court*") & *Lenko v. Manitoba*, 2016 MBCA 52, ¶ 71, [2017] 1 W.W.R. 291, 311 ("If there is a genuine issue for trial, it is not for the motion court to resolve that issue; rather, the motion should be dismissed and the matter should proceed to trial. The situation is different in Ontario, where the summary judgment rules have been substantially amended to expand the role of the court in resolving claims without a trial").

[188] First, a court must read the entire statute.¹³⁶ It must give the text¹³⁷ its ordinary meaning.¹³⁸ A court may never give text a meaning it cannot support.¹³⁹ “Words must not be given meanings they cannot possibly bear”.¹⁴⁰

[189] This initial reading plays a pivotal role. First, it may disclose the purpose or purposes the enactment pursues. Second, it identifies the potential plausible meanings of the contested provision.

[190] If this process discloses only one plausible or permissible meaning the interpretation inquiry ends.¹⁴¹ In this scenario, there is no need to factor in the effect of the purpose of the text.

¹³⁶ *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 41 (the Court approved this statement: “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”).

¹³⁷ *Spencer v. Australia*, [2010] HCA 28, ¶ 50, 241 C.L.R. 118, 138 per Hayne, Crennan, Kiefel & Bell, JJ. (“Consideration of the operation and application ... [of the summary judgment rule] must begin from consideration of its text”).

¹³⁸ *The Queen v. D.A.I.*, 2012 SCC 5, ¶ 26, [2012] 1 S.C.R. 149, 166 (“The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision”); *Thomson v. Canada*, [1992] 1 S.C.R. 385, 399-400 (unless an enactment indicates a contrary intention a word should be given its ordinary or usual meaning); *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109, [2017] 7 W.W.R. 343, 375 (“To do so one must identify the potential permissible meanings of these terms, taking into account their ordinary meanings”); *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917) (“Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them”); R. Sullivan, *Sullivan on the Construction of Statutes* 28 (6th ed. 2014) (“It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature”) & A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (“Words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense”).

¹³⁹ A permissible meaning is an interpretation that a reasonable reader could have given the text when it was produced. *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81, ¶ 81, 47 Alta. L.R. 6th 28, 56 per Wakeling, J.A. An impermissible meaning is a meaning that the text, given its ordinary meaning, cannot bear. *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4, 399 D.L.R. 4th 1, 6 (“A contrary interpretation would give the text an implausible meaning. A court may never do this”); *The Queen v. Barbour*, 2016 ABCA 161, ¶ 43, 336 C.C.C. 3d 542, 553 (chambers) (“in this pre-sentence period ‘custody’ means imprisonment. Any other interpretation would accord the text an implausible meaning”); *McMorran v. McMorran*, 2014 ABCA 387, ¶ 69, 378 D.L.R. 4th 103, 141 per Wakeling, J.A. (“A court must guard against attaching undue weight to the purpose which accounts for the text’s existence lest the court adopt a meaning which a reader competent in the use of the language could not reasonably attach to it”); *W. Ralston (Canada) Inc. v. Communications, Energy and Paper Workers Union of Canada, Local 819*, 147 O.A.C. 331, 332 (C.A. 2001) (“[a] statute ... [must be] given a meaning it can reasonably bear”); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 31 (2012) (“A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear”) & Frankfurter, “Some Reflections on the Reading of Statutes”, 47 Colum. L. Rev. 527, 543 (1947) (“Violence must not be done to the words chosen by the legislature”).

¹⁴⁰ *Zuk v. Alberta Dental Assoc.*, 2018 ABCA 270, ¶ 159.

Suppose that an enactment entitled the *Railway Workers' Safety Enhancement Act* declares that freight and passenger cars must be equipped with automatic couplers that eliminate the need for railway workers to manually connect freight and passenger cars. A court applying generally accepted statutory interpretation principles could not declare that locomotives must be equipped with automatic couplers just because this declaration would make a railway workers' job considerably safer. A locomotive is not a freight or a passenger car. Purpose does not trump text.¹⁴² Courts that are oblivious to this fundamental tenet of our legal system undermine the rule of law.¹⁴³ This is a cardinal judicial sin.

¹⁴¹ *The Queen v. Rodgers*, 2006 SCC 15, ¶ 20, [2006] 1 S.C.R. 554, 573 (“The clear language of s. 487.055(1) [of the *Criminal Code*] indicates that Parliament intended to authorize *ex parte* applications under this section. There is no room to interpret the provision as presumptively requiring that applications be brought on notice”); *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, ¶ 10, [2005] 2 S.C.R. 601, 610 (“When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process”); *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 704 (“where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced”); *Canada v. Mossop*, [1993] 1 S.C.R. 554, 581 (“when Parliamentary intent is clear, courts ... are not empowered to do anything else but to apply the law”) & *Unifor, Local 707A v. SMS Equipment Inc.*, 2017 ABCA 81, ¶ 82, 47 Alta. L.R. 6th 28, 56 per Wakeling, J.A. (“If this endeavor produces only one ... [plausible] meaning the interpretation process comes to an end”). Suppose that a plaintiff seeking damages of \$75,000 in a civil action applies for a jury trial. The applicable enactment provides that a court may order a jury trial if the plaintiff seeks damages in excess of \$100,000 and the plaintiff is the applicant. If a court granted this request it would attach a meaning to the text that it cannot support. A claim for \$75,000 is not a claim in excess of \$100,000. See *Purba v. Ryan*, 2006 ABCA 229, ¶ 55, 397 A.R. 251, 262 (the Court rejected out-of-hand the notion that a court could order a jury trial when the plaintiff's claim was for an amount below the \$75,000 floor).

¹⁴² *Williams Lake Indian Band v. Canada*, 2018 SCC 4, ¶ 202 per Brown, J. (“The Tribunal is no more constitutionally empowered than this Court to aim for a result consistent with its own policy preferences by holding fast to the bits of statutory text that it likes while ignoring the bits that it does not”); *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, 642 (“the general object and spirit of the provision can never supplant a court's duty to apply an unambiguous provision of the Act Where the provision is clear and unambiguous, its terms must simply be applied”); *The Queen v. Zundel*, [1992] 2 S.C.R. 731, 771 (the Court held that a statute cannot be given a meaning it cannot bear in order to promote equality and multiculturalism); *Covert v. Nova Scotia*, [1980] 2 S.C.R. 774, 807 per Dickson, J. (“Although a court is entitled ... to look to the purpose of the Act ... it must still respect the actual words which express the legislative intention”); *Ursa Ventures Ltd. v. City of Edmonton*, 2016 ABCA 135, ¶ 85, 91 C.P.C. 7th 73, 106 per Wakeling, J.A. (“Overzealous pursuit of an undeniable legislative purpose must not cause one to overlook the limited scope of the words the legislators used”); *Alberta v. McGeedy*, 2014 ABQB 104, ¶ 23, [2014] 7 W.W.R. 559, 571 (“No statutory decision maker can ignore substantive statutory provisions because it believes [they produce] ... unfair results”); *Williams v. Canada*, 2017 FCA 252, ¶ 50, 417 D.L.R. 4th 173, 189 per Stratas, J.A. (“judges – like everyone else – are bound by legislation. They must take it as it is. They must not insert it into the meaning they want. They must discern and apply its authentic meaning, nothing else”) & *Saville v. Virginia Railway & Power Co.*, 114 Va. 444, 76 S.E. 954, 957 (Sup. Ct. 1913) (“We hear a great deal about the spirit of the law, but the duty of this court is not to make the law, but to construe it It is our duty to take the words which the legislature has seen fit to employ and give to them their usual and ordinary signification, ... to give effect to it, unless it transcends the legislative power as limited by the Constitution”).

¹⁴³ E.g., *Alberta v. McGeedy*, 2014 ABQB 104, [2014] 7 W.W.R. 559 (the statutory delegate deliberately ignored the governing statutory provision and awarded long-term disability benefits to an employee who obviously was not

[191] If the inquiry reveals more than one plausible meaning, the court must select the meaning that best promotes the purpose that animates the text.¹⁴⁴

[192] Suppose that the same *Railway Workers' Safety Enhancement Act* provided that all railway cars must be equipped with automatic couplers. Is a locomotive a railway car?¹⁴⁵ The words “railway car” may refer to rolling stock that does not supply power or it may include all stock that rolls on tracks. To promote the safety of railway workers, the court must interpret “railway car” to include locomotives. It would make no sense to come to the opposite conclusion and expose railway workers to hazardous working conditions that would exist if railway workers had to manually connect locomotives to freight cars and passenger cars.

[193] An adjudicator tasked with the assessment of a r. 7.3 application both before and after *Hryniak v. Mauldin* must decide whether or not there is “no merit [to the nonmoving party’s position]”.

[194] The crucial word in r. 7.3 is “no”.

entitled to them) & *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)(the Court refused to give unambiguous legislative text its plain and ordinary meaning – penalize a church for hiring a foreigner to serve as its pastor – because it was satisfied Congress did not intend the result the plain meaning mandated holding that “a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers [Congress only intended to prohibit employers from hiring foreign manual labourers]”).

¹⁴⁴ *Celgene Corp. v. Canada*, 2011 SCC 1, ¶ 21, [2011] 1 S.C.R. 3, 13 (“The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute”); *McBratney v. McBratney*, 59 S.C.R. 550, 561 (1919)(“where you have rival constructions of which the language of the statute is capable you must resort to the object ... of the statute ... [and adopt] the construction which best gives effect to the governing intention”); *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109, [2017] 7 W.W.R. 343, 375-76 (“If there is more than one potential meaning, the court must select the option that best advances the purpose that accounts for the text”); *McMorran v. McMorran*, 2014 ABCA 387, ¶ 69, 378 D.L.R. 4th 103, 142 per Wakeling, J.A. (“[a] failure to be mindful of the purpose may cause a court to select from several permissible meanings one that does not best promote the attainment of the text’s object”); *Rainy Sky SA v. Kookmin Bank*, [2011] UKSC 50, ¶ 21, [2011] 1 W.L.R. 2900, 2908 (“If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other”) & A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012)(“A textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored”). Sometimes knowledge of the enactment’s purpose is of minimal assistance. This is usually so if it is stated abstractly. *McMorran v. McMorran*, 2014 ABCA 387, ¶ 70, 378 D.L.R. 4th 103, 143 per Wakeling, J.A. (“For example, the determination that a labour relations statute exists to promote collective bargaining by government employees does not assist much in determining whether a worker is employed by government or is an independent contractor”).

¹⁴⁵ *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 14-15 (1904)(the Court refused to interpret “car” in railways safety legislation narrowly – “any car ... not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars” – and exclude locomotives in order to promote the safety of railway employees responsible for coupling and uncoupling activities).

[195] Both of the world's leading English language dictionaries – The Oxford English Dictionary¹⁴⁶ and Webster's Third New International Dictionary of the English Language¹⁴⁷ – state that “no” as an adjective means “not any”. Webster's gives these illustrations: “< let there be ~ strife between you and me ... > < and ~ birds sing ... > < with ~ dancing in the streets or ritual bonfires ... >”. Here are some of the examples Oxford offers: “England had never no thoughts of securing this Right of the Flag by a formal Treaty ... There was no evidence that Nunney had authority to arrest”.

[196] Webster's also asserts that “no” as an adjective may mean “hardly any” or “very little”.

[197] Given that the adjective “no” may mean “hardly any” or “very little” merit, at what point does the strength of the nonmoving party' case preclude a court from granting the moving party summary judgment?

[198] The answer to this question must take into account the foundational rules of the *Alberta Rules of Court*, the remedial nature of legislation, as declared by the *Interpretation Act*,¹⁴⁸ and the governing case law that discusses the foundational rules and the importance of matching the features of a dispute with an appropriate dispute-resolution methodology.

[199] Insisting that summary judgment may be granted only if the nonmoving party's position is devoid of merit – it is hopeless and cannot possibly succeed – would diminish the value of summary judgment as an effective protocol in the Part 7 suite of expeditious dispute resolution mechanisms and would frustrate the goal of matching disputes with a resolution process that offers only the features that are needed to fairly and expeditiously determine the dispute at the least possible public and private cost.

[200] The better view, and the one adopted by panels of this Court on many occasions, is that summary judgment is appropriate if the disparity between the strength of the moving and nonmoving parties' position is so marked that the likelihood the court will adopt the moving party's position is very high – the outcome is obvious. In other words, a court may grant summary judgment even if it cannot be said that the nonmoving party's position is completely devoid of merit – the little merit it has does not deny the inevitability of an outcome adverse to the interests of the nonmoving party.

[201] This standard increases considerably the utility of the summary judgment protocol. It allows an adjudicator to resolve disputes the outcomes of which are obvious and that would not warrant making available to them the full spectrum of the civil trial process. It properly balances the legitimate interests of the litigants and the community's desire to allocate no more

¹⁴⁶ The Oxford English Dictionary (2d ed. 1989).

¹⁴⁷ Webster's Third New International Dictionary of the English Language Unabridged (2002).

¹⁴⁸ R.S.A. 2000, c. I-8.

public resources to resolve disputes than is necessary in a process devoted to fairness, justice, expedition and economy. Rule 1.2(1) of the *Alberta Rules of Court* expressly declares that “[t]he purpose of these rules is to provide a means by which claims can be fairly and justly resolved in a timely and cost-effective way”.

E. *Hryniak v. Mauldin* Is of Limited Precedential Value in Alberta

[202] *Hryniak v. Mauldin* interprets r. 20 of Ontario’s *Rules of Civil Procedure*.¹⁴⁹ Rule 20 allows an Ontario court to hear oral evidence and resolve credibility contests in the course of resolving a summary judgment application.

¹⁴⁹ R.R.O. 1990, Reg. 194. Rule 20 reads, in part, as follows:

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

...

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

...

20.04(2) The court shall grant summary judgment if,

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

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

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

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

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

[203] Rule 20 is not a summary judgment provision. It allows a court to hear oral evidence. Rule 20, in essence, is a summary trial rule. Justice Brown said precisely this in *Orr v. Fort McKay First Nation*:¹⁵⁰ “Ontario’s Rule 20.04(2.1) provides for a process that is broadly comparable to an application under Alberta’s civil procedure ... for judgment by way of summary trial under Rule 7.5”.

[204] I made the same point in my concurring opinion in *Can v. Calgary Police Service*:¹⁵¹

Presumably Ontario welded these additional fact-finding features onto its summary judgment model because summary trial is not part of Ontario’s expedited dispute resolution procedures. ... The conditions which prompted Ontario to marry two distinct concepts do not exist in Alberta. ...

...

[A] r. 7.3 summary judgment application is not an expedited dispute resolution protocol that has to be distorted to resolve disputes in less time and cost than a trial would necessitate. Part 7 of the *Alberta Rules of Court* introduces two other discrete models – trial of an issue and summary trial – that were created for that purpose. The trial of an issue and summary trial options may be more suitable than summary judgment in some fact patterns. But the point is this: their existence eliminates the need to convert Alberta’s summary judgment vehicle into the hybrid model Ontario’s rule makers built.

The wisdom of converting a protocol designed to remove disputes from the active file list because the nonmoving party’s position is without merit into one which resolves legitimate issues – both the moving and nonmoving parties’ positions have merit – is not clear. Other components of the Part 7 suite of expedited dispute resolution tools are available to resolve disputes the outcomes of which are not obvious.

¹⁵⁰ 2014 ABQB 111, ¶ 19, 587 A.R. 16, 22. See also *Jackson v. Canadian National Railway*, 2012 ABQB 652, ¶ 115, [2013] 4 W.W.R. 311, 362 (Justice Martin, when a Court of Queen’s Bench justice, observed that R. 20 of Ontario’s *Rules of Civil Procedure* is “significantly different from Rule 7.3(1) of the *Alberta Rules of Court*”) & Billingsley, “Hryniak v. Mauldin Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials”, 55 Alta. L. Rev. 1, 8-9 (“unlike the current Ontario provision, Alberta’s summary judgment rule does not endow the Court with additional fact-finding powers for the purpose of deciding a summary judgment application. On its face, Alberta’s summary judgment rule assumes that a decision will be made on the basis of the affidavit evidence submitted by the parties, and does not expressly authorize a court to weigh evidence in order to resolve disputed issues of fact”).

¹⁵¹ 2014 ABCA 322, ¶¶ 93, 95 & 96, 315 C.C.C. 3d 337, 383-85. See *Nelson v. City of Grande Prairie*, 2018 ABQB 537, ¶ 37 (Master Schlosser notes “the formal absence of a summary trial procedure in Ontario”).

[205] For jurisdictions with true summary judgment rules like Alberta's, the precedential value of *Hryniak v. Mauldin* is limited to its endorsement of public alternative dispute resolution procedures.¹⁵² I strongly stated this view before:¹⁵³

The fact that the Supreme Court declared in *Hryniak v. Mauldin* ... that its positive evaluation of expedited dispute resolution mechanisms is of 'general application' does not mean that Alberta's robust Part 7 suite of 'rocket docket' provisions is in any respect deficient. ... *Hryniak v. Mauldin* does not, in any way, support the notion that the existing principles which govern Alberta's summary judgment rule need to be revised.

...

There is no need to revisit either the purpose or the principles used to implement the summary judgment rule. Rule 7.3 and its predecessors have been in place since 1914.

[206] There is a settled understanding of the rule's purpose and principles. And these are entirely in accord with the values endorsed by *Hryniak v. Mauldin*.

F. Part 7 of the Alberta Rules of Court Presents a Suite of Complementary Expedited Dispute Resolution Protocols

[207] Insisting that summary judgment may be granted only if the ultimate disposition of a dispute is obvious does not diminish in any way the ability of the Court of Queen's Bench to resolve in an expeditious manner disputes the outcomes of which are not obvious¹⁵⁴ but are otherwise ripe for adjudication.

¹⁵² *Berscheid v. Federated Co-operatives Ltd.*, 2018 MBCA 27, ¶ 32, 421 D.L.R. 4th 315, 325 ("The Supreme Court of Canada's decision in *Hryniak* did not alter the basic test for summary judgment in Manitoba. However, it did make courts acutely aware of the need to consider the concept of proportionality in all aspects of the justice system"); *Lenko v. Manitoba*, 2016 MBCA 52, ¶ 71, [2017] 1 W.W.R. 291, 311 ("*Hryniak* did not ... change the test to be applied on a motion for summary judgment") & *Blunden Construction Ltd. v. Fougere*, 2014 NSCA 52, ¶ 6, 68 C.P.C. 7th 267, 269 ("*Hryniak v. Mauldin* ... has little bearing upon the circumstances, analysis, reasoning or result in this case. There ... [the Court] considered the application of a new Rule in Ontario ... which now empowers judges in that province to weigh the evidence, draw reasonable inferences from the evidence, and settle matters of credibility when deciding whether to grant summary judgment. Those powers are foreign to the well-established procedures and settled law which operate in Nova Scotia").

¹⁵³ *Can v. Calgary Police Service*, 2014 ABCA 322, ¶¶ 97 & 101, 315 C.C.C. 3d 337, 385 & 387.

¹⁵⁴ See *Stout v. Track*, 2015 ABCA 10, ¶ 51, 62 C.P.C. 7th 260, 279 per Wakeling, J.A. ("if the comparative strengths of the moving and nonmoving parties' positions are just about equal, so that the best one can say is that the moving party's position is marginally stronger than the nonmoving party's position, summary judgment is not appropriate. ... Other protocols are available for the timely and cost-effective resolution of disputes where the

[208] Rules 7.1 and 7.5 of the *Alberta Rules of Court* give the Queen’s Bench jurisdiction to try a decisive issue or conduct a summary trial and hear oral evidence.

[209] Each of these processes is fundamentally different from summary judgment.¹⁵⁵ Summary judgment is easily distinguished from summary trial. “Summary judgment disposes of a suit before trial and summary trial after trial”.¹⁵⁶ Oral evidence is a fundamental feature of a trial – not of summary judgment.¹⁵⁷

outcome is not obvious. For this subset of litigation, summary trial may be the best protocol”) & *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968) (“It is true that the issue of material fact required ... to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a judge or jury to resolve the parties’ differing versions of the truth at trial”).

¹⁵⁵ Queen’s Bench of Alberta Civil Practice Note No. 8, at 2 (effective September 1, 2000 to October 30, 2010) (“There is a very clear distinction between an application for summary judgment ... and a summary trial, which is like any other ‘conventional’ trial, except the procedures are simplified”); *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 17, 315 C.C.C. 3d 337, 357 per Wakeling, J.A. (“Ontario’s hybrid summary judgment and trial rule ... is fundamentally different [from] ... Alberta’s summary judgment rule”); *Soni v. Malik*, 61 B.C.L.R. 36, 40 (Sup. Ct. 1985) (“There are substantial differences between [summary judgment and summary trial] ... [T]he raising of a triable issue ... will not defeat an application under rule 18A [the summary trial rule]”); *Compton Petroleum Corp. v. Alberta Power Ltd.*, 1999 ABQB 42, ¶ 11, 242 A.R. 3, 7 (Q.B. 1999) (“in a summary trial, the court actually tries the issues raised by the pleadings and weighs the evidence”); *Chu v. Chen*, 2002 BCSC 906, ¶ 19, 22 C.P.C. 5th 73, 79 (“Under Rule 18A ... the hearing judge may enter judgment ... even though some of the facts may be disputed and the law may be in conflict”); *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 36 B.C.L.R. 2d 202, 211 (C.A. 1989) (“R. 18A was added to the Rules of Court in 1983 ... to expedite the early resolution of many cases by authorizing a judge in chambers to give judgment in any case where he can decide disputed questions of fact on affidavits or by way of the other proceedings authorized by R. 18A(5)”) & Welsh, “Judging the Summary Trial Rule”, 44 *The Advocate* 173, 174 (1986) (“Rule 18A is referred to as a summary *trial* rule rather than a ... summary judgment rule”). The unique role summary judgment played caused the Alberta Law Reform Institute in its Consultation Memorandum No. 12.12 (August 2004) entitled *Summary Disposition of Actions* at p. xv to oppose combining summary judgment with any other expedited dispute resolution device: “[W]hile there are some reasons why it might make sense to combine Rule 159 [summary judgment] with the summary trial procedures under Rules 158.1-158.7, the Committee decided that the functions of the two rules are too different to amalgamate them”. Redish, “Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix”, 57 *Stan. L. Rev.* 1329, 1335 (2005) (“the very purpose of summary judgment is to avoid unnecessary trials”); Issacharoff & Lowenstein, “Second Thoughts About Summary Judgment”, 100 *Yale L.J.* 73, 74 (1990) (“The summary judgment trilogy [of 1986] seems consistent with the spirit of the 1983 revisions to the Federal Rules in encouraging the judiciary to screen as well as to adjudicate cases”) & Louis, “Federal Summary Judgment Doctrine: A Critical Analysis”, 83 *Yale L.J.* 745, 769 (1974) (“The primary function of summary judgment is to intercept factually deficient claims and defenses in advance of trial”).

¹⁵⁶ *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 87, 315 C.C.C. 3d 337, 380 per Wakeling, J.A. See also *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, ¶ 14, 371 D.L.R. 4th 339, 349, (“[r. 7.3 of the *Alberta Rules of Court* is a procedure] for resolving disputes without a trial (as compared with Alberta’s summary trial procedure which is a form of trial”) (emphasis in original); *Diegel v. Diegel*, 2008 ABCA 389, ¶ 2, 303 D.L.R. 4th 704 (“A decision on summary judgment is not the same thing as a judgment on a summary trial, which may achieve fact findings from which an appeal of the typical sort might lie”); *U.B.’s Autobody Ltd. v. Reid’s Welding (1981) Inc.*, 1999 ABQB 956 ¶ 5, 258 A.R. 325, 327 (“a summary trial is, indeed, a trial; it is intended to provide a

[210] There is no reason to apply the summary judgment protocol when a matter is best adjudged by hearing oral evidence.

[211] Lord Woolf, M.R. made this point in *Swain v. Hillman*:¹⁵⁸

Useful though the [summary judgment] power ... is, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. ... [T]he proper disposal of an issue under [the summary judgment part] does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

[212] A summary trial or a determination of an issue may be appropriate if a dispute has features that promote a just resolution without accessing all aspects of the trial protocol – no need for questioning, for example. A dispute may largely turn on the resolution of a credibility issue¹⁵⁹ or simply require the application of a known legal standard to an agreed fact pattern, the outcome of which is not obvious.¹⁶⁰ Sometimes a final disposition is the most important

final resolution of the matter or an issue. The only avenue open to a party who is dissatisfied with the result of the trial is to file an appeal to the Court of Appeal”) & *Jackamaira v. Krakover*, [1998] HCA 27, ¶ 32, 195 C.L.R. 516, 528 per Gummow & Hayne, JJ. (“[summary judgment allows for the] summary determination of proceedings without trial”).

¹⁵⁷ *Can v. Calgary Police Service*, 2014 ABCA 322, ¶ 84, 315 C.C.C. 3d 337, 378-79 per Wakeling, J.A. (“While there is no provision in the *Alberta Rules of Court* which expressly precludes a motions court hearing a summary judgment application from ... [allowing a party to introduce oral evidence], there are sound reasons to conclude that the *Alberta Rules of Court* do so by implication”). See Billingsley, “*Hryniak v. Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials”, 55 Alta. L. Rev. 1, 8 (“unlike the current Ontario provision, Alberta’s summary judgment rule does not endow the court with additional fact-finding powers for the purpose of deciding a summary judgment application. On its face, Alberta’s summary judgment rule assumes that a decision will be made on the basis of the affidavit evidence submitted by the parties, and does not expressly authorize a court to weigh evidence in order to resolve disputed issues of fact”).

¹⁵⁸ [2001] 1 All E.R. 91, 95 (C.A. 1999). See *Re High Fructose Corn Syrup Antitrust Litigation*, 295 F. 3d 651, 655 (7th Cir. 2002) (“In deciding whether there is enough evidence of price fixing to create a jury issue, a court asked to dismiss a price fixing suit on summary judgment must be careful to avoid three traps The first is to weigh conflicting evidence (the job of the jury)”).

¹⁵⁹ *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, ¶ 116, 371 D.L.R. 4th 339, 350 (“Trials are for determining facts”).

¹⁶⁰ See *Erik v. McDonald*, 2017 ABQB 39, ¶¶ 1 & 2 (the Court, with the agreement of the parties, converted a summary judgment application into a summary trial procedure).

dimension of a dispute.¹⁶¹ An adjudicator will decide these contests using the balance of probabilities standard.

[213] *Valard Construction Ltd. v. Bird Construction Co.*¹⁶² illustrates the effective use of r. 7.5. Justice Verville, a senior judge, converted a summary judgment application into a summary trial and was able to immediately resolve an important contested fact issue by hearing three witnesses within a matter of hours.¹⁶³

G. Purolator’s Position Is So Strong and Weir-Jones Technical’s So Weak that the Ultimate Outcome of this Action Is Obvious

[214] Purolator defended, in part, on the ground that Weir-Jones Technical commenced its lawsuit after the two-year limitation period under the *Limitations Act*¹⁶⁴ expired.

[215] Its position is very strong. In letters dated November 3, 2008 and February 24, 2009 Weir-Jones Technical confirms that it had come to the conclusion that Purolator’s conduct contravened its legal obligations to Weir-Jones Technical. In a November 3, 2008 letter to Purolator Weir-Jones Technical asserted that Purolator had “intentionally and fraudulently misrepresented Purolator’s intentions.” A May 11, 2009 letter from Weir-Jones Technical to Purolator’s in-house counsel recorded Weir-Jones Technical’s intention to sue Purolator for “all matters that do not fall under the terms of the Collective Agreement”.

[216] It is beyond doubt that the two-year period under the *Limitations Act* commenced sometime between November 3, 2008 and February 29, 2009. Indeed, an overwhelming case can be made for a November 3, 2008 start date. By that date Weir-Jones Technical was not only

¹⁶¹ Yungwirth, “Summary Trials in Family Law: A Reasonable Alternative” 16 (March 2012) (Legal Education Society of Alberta Conference on Issues in Matrimonial Property) (“Parties are sometimes prepared to sacrifice ‘perfect justice’ in order to achieve a final result, especially given the effect on families of the litigation process”).

¹⁶² 2015 ABQB 141, 41 C.L.R. 4th 51.

¹⁶³ *Id.* at ¶ 7, 41 C.L.R. 4th at 55 (“This matter was set down for trial Valard opposed Bird’s request that its summary dismissal application be heard before the commencement of the trial. Bird was permitted to bring its application, but after hearing short submissions from Valard, the Court decided that the most efficient way to proceed would be to hear the mini-trial, and Bird’s counsel agreed that its submissions would in effect constitute its opening statement. Three witnesses were called ... and their combined testimony took less than a day”). See also *Choquette v. Viczko*, 2016 SKCA 52, ¶ 54, 396 D.L.R. 4th 449, 470 (“the Chambers judge could not have been truly confident in the result based only on the affidavit and documentary evidence in front of him. The finding ... of wilful blindness ... is controversial and evidence to support that finding is inconclusive at best. As this finding is pivotal to the Chamber judge’s conclusion, it is a genuine issue requiring a trial or at the very least, oral evidence”) & *Hryniak v. Mauldin*, 2014 SCC 7, ¶ 51, [2014] 1 S.C.R. 87, 107 (“Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself”).

¹⁶⁴ R.S.A. 2000, c. L-12, s. 3(1)(b).

aware of Purolator's failure to assign a line-haul route to it but had characterized this omission as intentional and a fraudulent misrepresentation.

[217] Justice Shelley correctly concluded that "[t]he evidence ... clearly establishes that ... [Weir-Jones Technical] was aware of the alleged breaches by ... [Purolator] long before it filed its Statement of Claim on July 2011."¹⁶⁵

[218] Weir-Jones Technical should have filed its claim before November 3, 2010 or at the latest February 29, 2011. It filed its claim on July 22, 2011 - somewhere between four and eight months late.

[219] Weir-Jones Technical's argument that the grievance delayed the start of the two-year *Limitations Act* period has no merit whatsoever. The grievance related to claims under the Teamsters-Purolator collective agreement and the lawsuit related to claims that were not covered by the collective agreement.¹⁶⁶ Weir-Jones Technical understood this distinction from the outset. Its May 11, 2009 letter to Purolator's in-house counsel expressly stated that Weir-Jones Technical intended to sue Purolator for "all matters which do not fall under the terms of the Collective Agreement."

[220] The fact that the Teamsters expressed a willingness to help resolve differences Weir-Jones Technical had with Purolator outside the collective agreement is entirely irrelevant. Suppose that a mutual friend of the guiding minds of Purolator and Weir-Jones Technical had offered to mediate. This would be of no consequence. Of vital importance is when Weir-Jones Technical became aware of the facts that caused it to conclude that Purolator had breached its contractual obligations to it and that an action against Purolator was warranted.

[221] Justice Shelley's conclusion to reject the grievance argument was indisputably correct.¹⁶⁷

[222] So were her decisions to reject Weir-Jones Technical's standstill agreement and promissory estoppel arguments.¹⁶⁸ They were completely unfounded. A joint wish to resolve

¹⁶⁵ 2017 ABQB 491, ¶ 36.

¹⁶⁶ See R. Snyder, *Collective Agreement Arbitration in Canada* 154 (6th ed. 2017) ("In a series of decisions issued over the last four decades, the Supreme Court of Canada has steadily expanded the scope of an arbitrator's jurisdiction and, at the same time, narrowed the jurisdiction of other courts and tribunals to adjudicate disputes arising in unionized workplaces. Perhaps the most important of these decisions is *Weber v. Ontario Hydro* which determined that arbitrators have been statutorily granted exclusive jurisdiction to deal with all workplace issues provided the essence of the disputes arise from the collective agreement").

¹⁶⁷ 2017 ABQB 491, ¶ 39.

¹⁶⁸ *Id.* ¶¶ 40 & 41.

differences without recourse to “costly legal proceedings” has no legal effect on the application of the two-year period under the *Limitations Act*.

[223] Purolator’s position is so strong and that of Weir-Jones Technical so weak that the ultimate outcome of this dispute is obvious. Weir-Jones Technical cannot possibly succeed.

[224] It follows that the same result is compelled if the less onerous standard is applied.

VII. Conclusion

[225] This appeal is dismissed.

Appeal heard on September 7, 2018

Reasons filed at Edmonton, Alberta
this 6th day of February, 2019

Wakeling J.A.

Appearances:

T.J. Byron
for the Appellant

T.V.G. Duke/N.J. Willis
for the Respondents

TAB 2

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-040494-110
500-17-064825-113

DATE: January 26, 2012

PRESIDING: THE HONOURABLE JEAN-YVES LALONDE, J.

500-11-040494-110

In the matter of the bankruptcy of:

LOCATION BRISTAR IDEALEASE INC.

and

JEAN-MARC BRISSETTE INC.

Bankrupts – Respondents

and

PRICEWATERHOUSECOOPERS INC.

Trustee

and

ROYAL BANK OF CANADA

Creditor – applicant

and

CANADIAN IMPERIAL BANK OF COMMERCE

Intervener

500-17-064825-113

ROYAL BANK OF CANADA

Plaintiff

v.

LOCATION BRISTAR IDEALEASE INC.

Represented by PriceWaterHouseCoopers Inc. – trustee
and

JEAN-MARC BRISSETTE INC.

Represented by PriceWaterHouseCoopers Inc. – trustee
and

GESTION JEAN-MARC BRISETTE INC.

GESTION J.E.A.N.Y INC.

9022-4767 QUÉBEC INC.

JEAN-MARC BRISSETTE

YVAN BRISSETTE

YANNICK BRISSETTE

NANCY BRISSETTE

Co-defendants

and

GENERAL ELECTRIC CANADA

EQUIPMENT FINANCE G.P.

and

G.E. CANADA EQUIPMENT FINANCING G.P.

and

CANADIAN IMPERIAL BANK OF COMMERCE

Impleaded parties

and

LAURENTIAN BANK OF CANADA

Impleaded party and garnishee

JUDGMENT

[1] This judgment will decide one question only: Can the proceeds from a cheque kiting scheme constitute property of the bankrupt at the time of the bankruptcy?

[2] Admittedly, a number of sub-questions further characterizing the issue will be posed, but they are primarily questions of law regarding which the Court will be required to make choices on the basis of the positions defended by the parties involved.

[3] To set up an illegal cheque kiting scheme, more than one financial institution must be involved. The perpetrator of the fraud must also choose to involve one or more moral persons (companies) who use the rotating advances (rotating lines of credit) granted by banks for the day-to-day management of business affairs.

THE ACTORS INVOLVED

[4] The administrators of Jean-Marc Brissette inc. ("JMB") and Location Bristar Idealease inc. ("Bristar" or, collectively, "Bristar") implemented a cheque kiting scheme through their companies.

[5] In this case, the illegal financial procedure relied on shell companies that were originally solvent borrowers who had gained the confidence of financial backers. There can be little doubt financial problems the administrators believed to be temporary gave rise to the temptation to simulate regular banking operations.

[6] Three banks were involved:

5.1 The Royal Bank of Canada ("RBC")

5.2 The Canadian Imperial Bank of Commerce ("CIBC")

5.3 The Laurentian Bank of Canada ("LBC")

TERMINOLOGY

[7] Essentially, the illegal practice of "cheque kiting" begins when a cheque is issued from a bank account whose balance is insufficient to cover it. To create confusion, money is recorded in more than one bank account at one moment in time. In most cases, the money is in transit or quite simply fictitious. The circulation of cheques between various accounts is jointly controlled. Here, the scheme was operated by the administrators of Bristar and JMB.

[8] Thus, cheques and registered funds are circulated from one bank to another and from one account to another, in a manner that maintains fictitious bank balances in some accounts while depositing the very same amounts in other accounts.

[9] Obviously, masterminds who undertake this type of fraud take advantage of the clearance periods that are inherent to cheque processing in the banking system.

[10] Cheques are circulated so quickly that an account at one banking institution is debited one day and credited the next. Over time, the false increase in bank balances varies from one bank to another, until one of the banks involved realizes that it is part of a kiting scheme and denounces the fraud. The system then collapses and any amounts credited are frozen. This is how, on May 31, 2010, LBC put an end to this illegal commercial scheme. At the time, an amount of \$804,725 was credited to Bristar's account.

[11] A picture is worth a thousand words: think of the game of musical chairs, where there are not enough chairs for the number of players when the music stops. Here, RBC

was the ultimate loser because it had been the primary contributor to the amount credited to Bristar's account (\$805,725) on June 1, 2010, the day the music stopped.

[12] The time that elapses between the moment a cheque is deposited into a first bank account and the moment that same cheque is recorded in, or deducted from, the bank account from which it is drawn is known as the "float time".

[13] The float time permits a depositor—in this case the bankrupt debtors—to withdraw the money deposited before the cheque is cleared by the bank from which the money was drawn. This is how dishonest persons are able to profit from the deception.

[14] The simultaneous presence of duplicate amounts in two different bank accounts at the same time creates what is referred to as "float". The float represents the over-evaluation of the balance of a bank account as the result of suspicious transactions at a specific moment in time, if the signs of kiting are identifiable.

[15] It is all quite sophisticated. Indeed, the imagination and thievery of such fraudsters know no bounds. Fortunately, banks have developed effective methods to curb and prevent this kind of scam.

FACTS

[16] Two corroborating expert reports are conclusive. They are, respectively, the report by PriceWaterHouseCoopers Inc. ("PWC"), which was presented to the Court with rigour and objectivity by expert forensic accountant Benoît Legault ("Legault"), and that by James Dickson ("Dickson"), retained by RBC and also a specialist in forensic accounting. Both experts testified frankly, answering the questions in the manner befitting experts, so as to provide the judge with a better understanding.

[17] The expert analyses reveal that all of the inter-account transactions recorded in the LBC accounts between April 14 and June 1, 2010, were suspicious transactions indicating a kiting scheme.

[18] The expert reports also state that, on May 7, 2010, the fluctuation of the credit granted by CIBC reached the C\$1 million limit.

[19] The reports further reveal that, between April 14 and May 31, 2010, all of the inter-account transactions recorded in the LBC bank accounts were equally suspicious.

[20] LBC discovered abnormal activity in Bristar's bank accounts on May 25, 2010. On that same date, LBC returned all of the cheques in circulation, putting an end to the scheme. As a result, on May 28, 2010, the date the bank accounts were closed, LBC had \$804,725 in the client accounts (of Bristar and JMB), after its advances had been reimbursed.

[21] The evidence reveals that the \$804,725 credited to Bristar at LBC was almost entirely (except for a few thousand dollars) from a single source, namely, cheques drawn from RBC accounts and deposited at the LBC after May 12, 2010.

[22] Hence RBC's seizure in revendication of the amounts deposited in the special account created by LBC when Bristar's account was closed. This seizure was preceded by a notice of claim of money, as permitted by section 437(1) of the *Bank Act*.¹

[23] On June 4, 2010, Bristar made an assignment in bankruptcy pursuant to the *Bankruptcy and Insolvency Act* ("BIA").² PWC was appointed the trustee in bankruptcy by the official receiver.³

[24] RBC filed a proof of claim with PWC in accordance with its status of unsecured creditor for an amount of \$1,677,877.75.⁴

[25] CIBC also filed a proof of claim with PWC as an unsecured creditor for the amount of \$1,267,982.66.⁵

[26] RBC and CIBC both claim the \$804,725 held by LBC but on different legal grounds. RBC argues that it should receive the entire amount because the proceeds from the kiting scheme are constituted primarily by cheques drawn from RBC and deposited at LBC. CIBC, for its part, argues that the \$804,725 held by LBC should be shared between itself and RBC, prorated to their respective claims. Both conclude that ownership of this asset, acquired by means of fraud perpetrated by the administrators of Bristar, is not vested in the trustee. In the view of both RBC and CIBC, it would be commercially immoral and contrary to the requirements of good faith for the Court to allow the amount held by LBC (\$804,725) to be considered property of the bankrupt.

[27] General Electric Canada Equipment Finance, G.P. ("G.E.") is also an unsecured creditor in the bankruptcy of Bristar and JMB. It does not see the matter in the same light as RBC and CIBC. According to G.E. and the trustee PWC, the money from Bristar's client account at the LBC is, despite everything, the property of the bankrupt, who must pay out to the body of creditors, which includes RBC, CIBC, and G.E.

LEGAL POSITIONS OF THE PARTIES

(A) The position of RBC

[28] RBC claims the money held by LBC, relying on section 437(2) of the *Bank Act*.⁶ Essentially, RBC argues that the amount held by LBC consists of the proceeds of fraud committed at its expense. According to RBC, the proceeds of fraud should not benefit the body of creditors because the trustee has no more right to them than the bankrupt debtors did (Bristar and JMB).

[29] Of course, RBC is of the view that the proceeds of the kiting scheme are not the property of the bankrupt within the meaning of section 67 *BIA*.⁷ In its main argument,

¹ SC 1991, c 46.

² RSC 1985, c B-3.

³ Exhibit BR-2.

⁴ Exhibit BR-3.

⁵ Exhibit CIBC-2.

⁶ *Supra* note 1. Section 437(1) and (2) are reproduced in Schedule A.

⁷ *Supra* note 2. Section 67 of the *BIA* is reproduced in Schedule A.

RBC invokes unjust enrichment associated with the common law notion of constructive trust. In the view of RBC, the money held by LBC was held in constructive trust for RBC, who was the victim of the fraud. It claims that it is justified in challenging the trustee's claims to the amounts in dispute rather than being required to file a claim for property under section 81 *BIA*.⁸ According to RBC, a bankruptcy trustee has no right to the proceeds of crime and must waive them.⁹

[30] RBC urges the Court to apply the common law rule in *Ex parte James* to find that the trustee cannot claim a right to take possession of the proceeds of fraud.

[31] Put succinctly, the legal rule enunciated in *Ex parte James*¹⁰ is based on equity. According to this common law concept, the trustee, as an officer of the court, should act equitably. Although the trustee may have a right to certain property, the bankruptcy court should not permit it to exercise this right if, in doing so, it would be violating the rules of natural justice.

[32] According to RBC, the principles of commercial morality dictate that the property vested in the trustee and, consequently, in the body of creditors, should not be enriched to the detriment of the creditor who was the victim of the fraud.

[33] The concept of constructive trust enables the bankruptcy court to draw on the accessory notion of tracing to the extent necessary. That is why RBC sought to show that the money held by LBC came primarily from cheques drawn from RBC.

[34] Finally, RBC argues that a fiduciary obligation may arise from the obligation to act in good faith within the meaning of articles 6, 7, 1375, and 1376 of the *Civil Code of Québec* (CCQ).¹¹ Hence the possibility of tracing the illegally appropriated money and returning it to the victim.

(B) The position of CIBC

[35] RBC and CIBC come together on a few points of law. First, CIBC submits that the money held by LBC is the proceeds of illegitimate operations by Bristar and JMB. If not for the bankruptcy, they would have no right to claim this money.

[36] According to CIBC, the rights of the trustee are no greater than those of Bristar and JMB.¹² It also cites *R. v. Martino*,¹³ an Ontario criminal case which decided that a trustee could not claim the proceeds of a crime committed by the bankrupt.

[37] The template for CIBC's argument differs, however, when it comes to the application of the notions of equity and constructive trust that RBC would import from the common law. According to CIBC, since the enactment of the *Federal Law – Civil*

⁸ *Ibid.* Section 81 of the *BIA* is reproduced in Schedule A.

⁹ *R. v. Martino*, [1998] OJ No 6444.

¹⁰ *Re Condon: Ex parte James* (1874) 9 Ch App 609.

¹¹ Articles 6, 7, 1375 and 1376 CCQ are reproduced in Schedule A.

¹² *Lefebvre (Trustee of); Tremblay (Trustee of)* [2004] 3 SCR 326.

¹³ *Supra* note 9.

Law Harmonization Act, No. 1,¹⁴ Quebec courts no longer have the jurisdiction to apply the common law notion of equity. Ultimately, according to CIBC, the civilian approach provides a legal equivalent in the form of the requirements of good faith (articles 6 and 7 CCQ), the duty to act fairly, the principle of *fin de non-recevoir*, and that of unjust enrichment.

[38] According to CIBC, the bankruptcy court should exercise its judicial discretion to apply these civilian principles. Once these parameters are imposed, the Court may prevent the trustee from exercising its right to claim, if such a right exists, the amounts held by LBC.

[39] Finally, CIBC favours the distribution of the money, prorated to the losses suffered by the victims of the fraud.

[40] In the eyes of CIBC, RBC cannot invoke a property right in or a right to trace the money at issue here. Without a trust, the traceability of the funds would be a non-issue. According to CIBC, the concepts of constructive trust and tracing do not apply in Quebec.¹⁵ Moreover, CIBC is of the opinion that the money paid by RBC and credited to LBC cannot be traced because the money deposited is fungible property.

[41] In short, CIBC opines that, while RBC cannot claim to have a property right in or right to trace the money held by LBC, this credit item remains the proceeds of fraud, which should benefit the victims in proportion to their losses.

(C) The positions of the trustee and of G.E.

[42] At the outset, it should be pointed out that the trustee, while supporting G.E.'s position, displayed a degree of neutrality that is appropriate to an officer of the bankruptcy court.

[43] It falls primarily to G.E. to demonstrate that the disputed money meets the definition of property of a bankrupt. To do so, G.E. invokes several arguments, including the very purpose of the *BIA*, which is to ensure the proper administration of the property of the bankrupt so as to ensure an equitable sharing of the bankrupt's assets among its creditors, subject to the priorities set out in section 136 *BIA*.

[44] According to G.E., the mechanism whereby creditors must argue their claim before the trustee in bankruptcy seeks to prevent all ranks of creditors from competing for the bankrupt's assets. This includes victims of a fraud whose claims are not excluded by section 67 *BIA* but are otherwise protected with respect to the discharge under section 178 *BIA*.

[45] G.E. argues that, in the event of bankruptcy, the property belonging to the bankrupt debtor passes to the trustee (section 71 *BIA*). All of the bankrupt's assets are immediately and without distinction vested in the trustee. Thus, the role of the trustee is

¹⁴ SC 2001 c 4, s 33.

¹⁵ Sections 8.1 and 8.2 of the *Interpretation Act*, RSC 1985, c I-21, as amended on April 1, 2005. These provisions are reproduced in Schedule A.

not limited to representing the bankrupt; it also includes ensuring the proper administration of the bankrupt's property. Beyond this role, the trustee also represents the creditors on behalf of whom it is responsible for the forced sale of the bankrupt's assets and the orderly distribution of the proceeds of the winding-up. The rights and obligations of the trustee and creditors should be assessed with this dual role in mind.¹⁶

[46] Relying on section 70 *BIA*,¹⁷ G.E. is of the view that the seizure before judgment by RBC is invalid because of the precedence conferred on the bankruptcy. According to G.E., this reflects Parliament's intent to favour single control in bankruptcy matters.

[47] G.E. goes on to argue that the disputed amount should be vested in the trustee since it was part of Bristar's property on the day of its bankruptcy (section 71 *BIA*).

[48] According to G.E., the disputed amount falls within the definition of section 67 *BIA*, which specifies what does and does not comprise "property of the bankrupt". G.E. maintains that, oddly, the amount held by LBC before the bankruptcy was subject to the power of Bristar in or over this property, within the meaning of paragraph 67 *BIA*.

[49] G.E. advocates a broad interpretation of "property of the bankrupt" in order to include the disputed amount.

[50] G.E. characterizes the legal relationship between Bristar and LBC in light of the amount recorded in the bank account at issue as a claim. In its view, this is also a claim that RBC has against Bristar, one that should be the object of a proof of claim in the bankruptcy proceedings. This characterization, it submits, applies even in cases where cheques are drawn from an account with insufficient funds.¹⁸

[51] G.E. asks the Court to find that all the money advanced to Bristar should become its property, and that this is the case for the money coming from RBC and credited to Bristar at LBC.

[52] Moreover, G.E. considers the money advanced to Bristar by RBC to be fungible property that cannot be traced because it has since been deposited and merged with the total money supply of LBC, who is the debtor of Bristar for that amount. LBC's only obligation is to return an equivalent amount of money to Bristar, as creditor of that amount.

[53] Stated clearly, G.E. argues that RBC has no right to trace the money advanced to Bristar. Rather, it has a personal remedy that should now be presented by means of a proof of claim in Bristar's bankruptcy proceedings.

[54] Thus, G.E. concludes that the disputed amount should be collected by the trustee as "property of the bankrupt" and distributed according to the order of priority established in the *BIA*.

¹⁶ *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 SCR 564.

¹⁷ Section 70 of the *BIA* is reproduced in Schedule A.

¹⁸ *Alberta (Treasury Branches) v. McIntosh*, [1993] AJ No 78 at para 44: "An overdraft is in substance a loan by the bank to the depositor".

[55] In the same vein, G.E. suggests that RBC, through its proceedings, is attempting to change this order of priority by attributing to itself a priority that it is not granted under the Act.

[56] Finally, G.E. argues that there is no legislative vacuum for victims of fraud because, in section 178 *BIA*, Parliament has provided that a bankrupt debtor who has committed fraud cannot be discharged from his victim's claim. On the basis of this argument, G.E. urges prudence in the Court's exercise of judicial discretion. In its view, the bankruptcy court may not exercise its inherent jurisdiction if Parliament has already provided an appropriate remedy.

ANALYSIS AND ANSWER TO THE QUESTION

[57] To resolve the ultimate issue as to whether the proceeds of a kiting scheme may constitute "property of the bankrupt", a few questions of law raised by the parties must be answered:

- (A) Does section 437 of the *Bank Act*¹⁹ establish a right to trace?
- (B) Is it still possible to apply the principles of constructive trust and tracing in Quebec?
- (C) Is the foundation of equity underlying the common law precedent in *Ex parte James*²⁰ applicable in this case?
- (D) Does Quebec law contain the equivalent of equity?
- (E) How should the amount held by LBC be characterized?
- (F) What rights can be argued by RBC and CIBC?
- (G) Do the amounts at issue meet the definition of "property of the bankrupt" within the meaning of section 67 *BIA*?
- (H) Did the trustee comply with the principles of good faith, fairness, and commercial morality when exercising its right to take possession of the proceeds of the kiting scheme?

(A) Does section 437 of the *Bank Act*²¹ establish a right to trace?

[58] The only thing that section 437 *Bank Act*²² permits RBC to do is characterize itself as a claimant of the money held by LBC. If such a claim is made as part of judicial proceedings brought by RBC, LBC may pay the disputed amounts to the depositor (Bristar, or in this case the trustee in bankruptcy) only if it has the consent of the claimant RBC. Conversely, to pay RBC the amount, it would require authorization from Bristar or the trustee.

¹⁹ *Supra* note 1.

²⁰ *Supra* note 10.

²¹ *Supra* note 1.

²² *Ibid.*

[59] This does not indicate a right to trace on the claimant's part. Where there is no claim, however—which is not the case here—the bank may pay the principal and interest to the depositor or to the order of the depositor. This is how LBC was able set off its own debt with the money originating primarily from RBC before the court proceedings initiated by RBC and before the bankruptcy, even though it already suspected a kiting scheme was in operation.

[60] Section 437(2) makes it possible for a claimant to raise this exception, thereby preventing a bank from depositing the money claimed without its consent or, it goes without saying, judicial authorization.

[61] The Court is of the view that section 437(2) does not negate section 70(1) *BIA* in the event of a bankruptcy. There is no doubt that the bankruptcy proceeding takes priority over every other proceeding against the property of a bankrupt, including the seizure before judgment carried out by RBC along with a notice pursuant to section 437(2) of the *Bank Act*.²³

[62] In short, section 437(2) of the *Bank Act*²⁴ confers no right in the thing and no right to trace. Without the attendant judicial proceedings, it is of no use to RBC. In any event, the bankruptcy takes precedence over the judicial proceedings brought by RBC against the bankrupt debtors (Bristar and JMB).

(B) Is it still possible to apply the principles of constructive trust and tracing in Quebec?

[63] The *Civil Code of Québec (CCQ)*, enacted in 1994, does not contemplate implied trusts, resulting trusts, or constructive trusts.²⁵ As the commentaries of the Minister of Justice on the enactment of article 1262 *C.C.Q.* make clear, the legislature consciously sought to preclude the creation of an implied trust in Quebec law.²⁶

[64] The constructive trust is not a recognized concept in our civil law.²⁷

[65] The notion of tracing, which generally requires the existence of a trust or a common law fiduciary relationship,²⁸ is frequently used in cases involving claims, whether under the *Quebec Code of Civil Procedure (CCP)* or a claim for property under section 81 *BIA*.

[66] The principle remains the same in any event: for property to be claimable, it must be identifiable.²⁹ Indeed, this is the source of the difficulty of tracing fungible property such as money deposited into a bank account.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Plachcinski (Syndic de)*, [2002] RDI 692.

²⁶ *Commentaires du ministre de la Justice*, Volume 1 (Les publications du Québec) at 750-751.

²⁷ *Barette v Falardeau*, 2010 QCCA 989.

²⁸ L.W. Houlden & G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed rev, Vol 2 at 3-91.

²⁹ *Meunerie BL inc. (Syndic de)*, 2007 QCCA 1601.

[67] The process of tracing is practically inapplicable in the case of a monetary loan. The lender is deemed to have parted with the money loaned, over which he or she will only have a right of claim. The borrower becomes owner in title of the money and, if this money is deposited in the bank, the bank then becomes the owner and the money is merged with the bank's money supply. In such a situation, the depositor becomes creditor of the amount deposited, and the debtor bank has the obligation to return to the depositor the equivalent of the money deposited. Money is most assuredly fungible property that loses its identity when deposited in a bank account.³⁰

[68] In short, the constructive trust is not a part of Quebec law. As for the principle of tracing, it applies in cases involving claims. It does not apply to the facts of the case before us, however, because of the fungible nature of the property claimed (money).

(C) Is the foundation of equity underlying the common law precedent in *Ex parte James*³¹ applicable in this case?

[69] Before the amendments brought by the *Federal Law – Civil Law Harmonization Act, No. 1*,³² section 183(1) *BIA* conferred on courts of justice sitting in bankruptcy jurisdiction in law and in equity, while making no distinction between civil law jurisdiction and common law jurisdiction. Section 183(1)(b) was repealed and replaced by section 183(1.1) *BIA*, which struck out the words "at law and in equity" to describe the jurisdiction conferred on the Quebec Superior Court in bankruptcy matters.

[70] In Ontario, the notion of equity is incorporated through section 96 of the *Courts of Justice Act*.³³ In Quebec, it is not—or at least not through a specific statute.

[71] James J. of the Chancery Courts of England³⁴ was applying the law of equity when he wrote the following.

...

The Court, then, finding that he [the trustee, in his capacity as officer of the court] has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.

...

(Citation omitted.)
(Emphasis added.)

³⁰ *Boutiques San Francisco inc. v. Claudel Lingerie inc.*, 2004 CanLII 639 (QCCS).

³¹ *Supra* note 10.

³² *Supra* note 14.

³³ RSO 1990, c C-43.

³⁴ In England, the creation of the Chancery Courts can be explained by the gaps in the common law (Bijuralism and Drafting Support Services Group, Legislative Services Branch, Department of Justice Canada and Corporate and Insolvency Law Policy Directorate, Industry Canada, "Some Legislative Policy Issues").

[72] This rule is typical of the principles of the law of equity.³⁵ It is based on the court's prerogative to prevent a trustee from exercising a right that is otherwise technically well founded. In *Ex parte James*, the principles of natural justice prevailed over the trustee's right to take possession of money that, in equity, belonged to another.

[73] According to the federal rules of interpretation, when it is necessary to refer to civil law rules, principles, or concepts, reference must be made to the rules, principles, and concepts in force in each province.³⁶ The law of equity is not part of the civil law of Quebec.³⁷ There is no specific act incorporating it into our legal system.

[74] In *Microtec*,³⁸ the Court of Appeal confirmed that the principle of equity and the rule set out in 1874 in *Ex parte James*³⁹ are not recognized in the civil law.

[75] This therefore answers that question.

(D) Does Quebec law contain the equivalent of equity?

[76] The objective of equity is to remedy shocking situations resulting from the regular application of a convention or law and that offend justice.

[77] As the late Claude Masse wrote: [TRANSLATION] "...good faith includes the principle of equity, and in our view, by the combined effect of this inclusion and the enshrinement of the general principle of good faith in articles 6 and 1375 CCQ, equity also became a general principle in Quebec law".⁴⁰

[78] Drawing inspiration from these concepts, Guthrie, J., of the Superior Court, reproached a trustee for ignoring a counter-letter attributing the undivided share of a

³⁵ The 1873-1875 *Judicature Acts* created a veritable merger of the ordinary courts with the Chancery Courts as part of a large-scale judicial reorganization with a view to establishing the High Court of Justice. Following this reorganization, the judges of the High Court of Justice were empowered to make rulings under both the common law and equity. In Ontario, where the first Chancery Court was not created until 1837, a judicial reorganization in the late nineteenth century, at the same time as in England, established the High Court of Justice, whose judges were empowered to make rulings under both the common law and equity (Bijuralism and Drafting Support Services Group, Legislative Services Branch, Department of Justice Canada and Corporate and Insolvency Law Policy Directorate, Industry Canada, "Some Legislative Policy Issues").

³⁶ Sections 8.1 and 8.2 of the *Interpretation Act*, RSC 1985, c. I-21.

³⁷ Indeed, the Court of Common Pleas, later the King's Bench and then the Superior Court of Quebec, has always been an ordinary court, similar in many respects to the ordinary courts in British law. Unlike common law jurisdictions, however, Quebec courts have never undergone a judicial reorganization resulting in the merger of jurisdictions in equity and in common law, as was done under the *Judicature Acts*. Indeed, there is reason to wonder whether this could even have happened in Quebec, where equitable jurisdiction, exercised by Chancery Court judges between 1765 and 1774, first fell into disuse following the coming into force of the *Quebec Act* and then completely disappeared (Bijuralism and Drafting Support Services Group, Legislative Services Branch, Department of Justice Canada and Corporate and Insolvency Law Policy Directorate, Industry Canada, "Some Legislative Policy Issues").

³⁸ *Entreprises Microtec inc. v. PriceWaterHouseCoopers inc.*, 2006 QCCA 1291.

³⁹ *Supra* note 10.

⁴⁰ Mélanges Claude Masse, *Enquête de justice et d'équité* (Yvon Blais, 2003) at 497.

valuable immovable to a third party and not to the bankrupt. This is how our esteemed colleague expressed himself:

...

[TRANSLATION]

[66] The only effect of this motion presented by the trustee is to disguise reality, deny the respondent's rights, and cause the unjust enrichment of the debtor's creditors and ultimately, of the debtor himself. Indeed, if the motion is granted, the respondent will be evicted from his home and his estate will be impoverished by approximately \$999,000—and the debtor will become richer than ever!

[67] Pursuant to articles 7 and 1375 CCQ, the Court is of the view that, in the present case, the trustee is attempting to exercise its rights "excessively, unreasonably, and thereby in a manner contrary to the requirements of good faith" and even in a manner inconsistent with natural justice.

⁴¹
...

(Emphasis added.)

[79] Thus, it may be observed that the result arrived at by James, J. of the Chancery Court in 1874 may be reached by applying the principles of civil law.

[80] It is important, however, to note that Guthrie J. was considering the undivided share of an immovable, not fungible property. Moreover, he was not asked to decide whether the immovable was initially the property of the bankrupt within the meaning of section 67 *BIA*. This was the result of the dismissal of the application for partition and licitation that excluded the immovable from the bankrupt's estate, not a question of whether the property became vested in the trustee. This is a significant distinction between the facts of that case and those of the case before us.

[81] We must conclude, therefore, that there is an equivalent in the civil law to the principles stated in *Ex parte James*.⁴²

(E) How should the amount held by LBC be characterized?

[82] Before the date of the bankruptcy, the disputed amount constituted a claim by Bristar against LBC up to the amount credited to the bank account.

[83] Of course, most of this money came from RBC and was credited without legal justification, but the fact nevertheless remains that Bristar had the power of a creditor in regard to that amount. Before the kiting scheme came to light, Bristar could have used this money for its own benefit.

[84] Even after the kiting scheme was exposed—but before the bankruptcy—LBC paid itself back for the amount of the advances given to Bristar, thus setting off its debt

⁴¹ *Gilles Bédard (Syndic de)*, 2005 CanLII 20483 (QC Sup Ct).

⁴² *Supra* note 10.

with money coming primarily from RBC. This was a legal set-off between two claims that were liquid and exigible that were operated by LBC. This was not contested at the hearing.

[85] Thus, the banking system recognizes the beneficiary of the kiting scheme as a creditor, despite the fraud.

[86] Under banking law, any bank account overdraft is characterized as the client's debt to the bank. Let us see what the author M.H. Ogilvie has to say on the subject:

...

When an account is in funds, the customer is the creditor of the bank, but when there is a negative balance in the account, or an overdraft, the customer becomes the debtor of the bank. An overdraft is legally characterized as a loan granted to a customer by the bank, and as such, a privilege accorded to certain customers either from time to time or on an on-going basis. An overdraft privilege may be granted by contract or by course of dealing by which customers have been permitted overdrafts. When granted by contract, the overdraft privilege is usually for a stipulated sum for a stipulated period of time at a stipulated rate of interest. Where a bank has permitted overdrafts in the absence of a contract, the course of dealing is established when the customer draws a cheque and thereby creates a debit in the account. This is characterized as a request for an overdraft which has been granted.

43

...

[Emphasis added.]

[87] Consequently, even when there is no money, the drawee bank may agree to pay a cheque, or it may do so in error. In such situations, it is deemed to have granted a loan to its client.

[88] This is the position in which RBC found itself on May 29, 2010, when LBC closed Bristar's account with \$804,725 credited to it.

[89] Thus, RBC is Bristar's creditor, and it was correct to file proof of claim in the bankruptcy for the amount of its loss.

[90] On the date of the bankruptcy, Bristar was itself a creditor against LBC for an amount of \$804,725. This amount was deemed to have been loaned to LBC, contingent on its reimbursing the equivalent plus usual interest.

(F) What rights can be argued by RBC and CIBC?

[91] Having been characterized as lenders, the banks have a claim against Bristar for the amount of the loan. No fiduciary obligation arose from the circulation of cheques. Therefore, the right that may be exercised by RBC and CIBC is personal.

⁴³ M.H. Ogilvie, *Bank and Customer Law in Canada, Essentials of Canadian Law* (2007) at 230.

[92] Obviously, the banks may also claim unjust enrichment, but again this is a personal right to be exercised against Bristar. In the case of a bankruptcy, this claim is expressed as a proof of claim.

[93] The banks also have an extracontractual remedy against the administrators of Bristar and JMB. If the administrators are also bankrupt, as the Court understands them to be, the banks may oppose their discharge insofar as fraud is demonstrated.

(G) Does the money in dispute meet the definition of "property of the bankrupt"?

[94] The definition of the concept of "property" in section 2 *BIA*,⁴⁴ taken together with that of "property of the bankrupt" in section 67 *BIA*,⁴⁵ reveals the legislative scope of what may constitute "property of the bankrupt" vested in the trustee in the event of bankruptcy.

[95] It is a relatively flexible notion that takes its meaning from the context and that should be interpreted harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.⁴⁶

[96] The general object of the *BIA* consists in ensuring the proper administration of the affairs of the bankrupt and a fair balance between enforcing the rights of creditors and giving the bankrupt a chance to start over.⁴⁷

[97] The precedence given to the bankruptcy process results in a stay of proceedings and single management and prevents competition for the assets of the insolvent person. Once these parameters have been established, it is then possible to proceed with an ordered liquidation of the bankrupt's assets and their distribution in a manner consistent with the order of priority set out in the *BIA* (section 136).⁴⁸

[98] The clear purpose of the *BIA* grounds the conclusion that Parliament intended for a broad and liberal application of this statute to every kind of insolvency situation requiring an arrangement or an ordered liquidation of the assets of the insolvent person.

[99] This explains how the *BIA* is applicable even after the discovery of large-scale fraud of the kind that has made headlines in Quebec in recent years. Simply imagine the floodgates that would open if every single defrauded person launched proceedings to claim fraudulently appropriated money. The competition for assets would be unmanageable.

[100] If every defrauded person claimed his or her property, how would the distribution be carried out? What order of priority would govern the distribution of property or the proceeds of realization? The law does not contemplate such a situation in any context other than through the application of the *BIA*.

⁴⁴ Section 2 of the *BIA* is reproduced in Schedule A.

⁴⁵ Section 67 of the *BIA* is reproduced in Schedule A.

⁴⁶ *Saulnier v. Royal Bank of Canada*, [2008] 3 SCR 166 at 16–17.

⁴⁷ *Husky Oil Operations Ltd. v. Ministre du Revenu national*, [1995] 3 SCR 453.

⁴⁸ *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 SCR 379.

[101] The disagreement between RBC and CIBC regarding the distribution of the disputed amount between them has revealed a legal vacuum. One party, RBC, claims to be the sole victim, while the other, CIBC, asserts that it is entitled to the amount in proportion to the respective losses of the fraud victims. On what legal basis should this issue be decided? The *BIA* presents a legislative solution from which the Court must not deviate.

[102] In this case, the disputed amount represents a claim that was part of Bristar's assets on the date of its bankruptcy. Excluding the proceeds from the kiting scheme would have the effect of granting the banks the status of priority creditor, which they do not have under the law. Moreover, it can be considered that, shortly before the discovery of the kiting scheme by LBC, Bristar had power over the disputed amount within the meaning of paragraph 67(d) *BIA*.⁴⁹ Could it not then exercise this power for its own benefit, within the meaning of this inclusion in the definition of "property of the bankrupt" in section 67 *BIA*? In the view of the Court, this approach is consistent with the scheme of the Act.

[103] Excluding the proceeds of the kiting scheme would be tantamount to adding a restriction that section 67 *BIA* does not contemplate. It is not for the Court to create new legal restrictions. That is the role of Parliament.

[104] In this case, neither LBC nor Bristar may be considered to be a trustee of the amount disputed between the parties. On the date of the bankruptcy, Bristar had a claim against LBC. This claim was "property of the bankrupt". RBC and CIBC have a claim that they may raise in the bankruptcy proceedings.

(H) Did the trustee comply with the principles of good faith, fairness, and commercial morality when it exercised its right to take possession of the proceeds of the kiting scheme?

[105] It hardly bears repeating that, under the banking system, LBC was permitted to reimburse itself for the advances it had granted Bristar even after the discovery of the kiting scheme. Commercial ethics were thus safeguarded.

[106] The principles of good faith and fairness always depend on context. The Court understands quite well that Guthrie, J., of the Superior Court, reproached the trustee for having exercised its rights excessively, unreasonably, and in a manner contrary to the requirements of good faith.⁵⁰ The context was very different, however. In that bankruptcy case, the trustee refused to recognize the effects of a counter-letter because it was published after the date of the bankruptcy. Guthrie, J., correctly concluded that the trustee was seeking to disguise the truth and cause unjust enrichment, while causing the bankrupt's former *de facto* spouse to be unjustly deprived of the immovable in dispute. The facts of the case before us are clearly different from that case. Here, the trustee is in good faith.

⁴⁹ Section 67(d) of the *BIA* is reproduced in Schedule A.

⁵⁰ *Supra* note 41.

[107] The application of the principles of good faith and fairness is also frequently a matter of judicial discretion when the court is faced with a shocking situation in the event of the strict application of the law. A consideration of the facts reveals that this is not the case here.

[108] RBC and CIBC may share in the distribution of the proceeds from the liquidation of the assets of the bankrupts Bristar and JMB, as may all of the bankrupts' unsecured creditors. This is a very fair solution.

[109] The exercise of judicial discretion must yield to the application of statutory provisions (*BIA*) when the very purpose of the statute is to settle situations of insolvency such as the one before us. This time, the enrichment of the body of creditors is fully justified through the application of the *BIA*.

[110] As the Court of Appeal stated in *Parent v. Delage*:⁵¹

...

[TRANSLATION]

I do not believe that I am required to rule on the argument that the bankrupt obtained the loan through fraud or false representations. Nor could that change the legal nature of the relationship between the lender and the borrower. Moreover, even if the transaction could have been voided, it would not have authorized the bankrupt, after its assignment in bankruptcy, to return property vested in the trustee to its creditor.

...

[Emphasis added.]

CONCLUSION

[111] In summary, the Court finds that the specific context of the case favours an affirmative response to the substantive issue. Here, the proceeds of the kiting scheme implemented by Bristar constitute "property of the bankrupt" that is vested in the trustee. The solution provided by the bankruptcy is clearly more appropriate to the facts of the case than any of the solutions proposed by the banks.

[112] Counsel for CIBC hoped for a judicial intervention, an *Ex parte Lalonde* based on the requirements of good faith, the principle of fairness, and judicial discretion. Regrettably, in the circumstances of the present case, that would be inappropriate.

FOR THESE REASONS, THE COURT:

[113] **GRANTS** the motion of the trustee PriceWaterHouseCoopers Inc.;

[114] **DECLARES** that all the amounts held by the impleaded party and garnishee Laurentian Bank of Canada on behalf of or in the bank accounts held by Location Bristar Idealease Inc. and Jean-March Brissette Inc. are vested in and under the control

⁵¹ 1974 CA 189 at 7–8.

of the trustee PriceWaterHouseCoopers and that these amounts must be processed and disposed of in accordance with the *Bankruptcy and Insolvency Act*.

[115] **DECLARES** that the seizures before judgment carried out by the impleaded party Laurentian Bank of Canada do not preclude such property being vested in the trustee PriceWaterHouseCoopers inc.;

[116] **DISMISSES** the motion to authorize the Royal Bank of Canada to continue a civil suit in file number 500-11-040494-110;

[117] **REJECTS** the declaration of intervention by the Canadian Imperial Bank of Commerce in file number 500-11-040494-110;

[118] **NOTIFIES** the impleaded parties General Electric Canada Equipment Finance, G.P, G.E. Canada Equipment Financing G.P., and Laurentian Bank of Canada of this judgment;

[119] **WITH COSTS** solidarily against the Royal Bank of Canada and the Canadian Imperial Bank of Commerce, including the expert fees for the cost of the report of PriceWaterHouseCoopers inc. and for the presence of the expert Benoît Legault before the Court.

JEAN-YVES LALONDE, J.

Mtre René R. Gauthier
LAZARUS CHARBONNEAU
For the Royal Bank of Canada

Mtre Bertrand Giroux
BCF
For PriceWaterHouseCoopers inc.

Mtre Guy Martel
Mtre Danny Vu
STIKEMAN, ELLIOTT
For General Electric
Equipment Finance G.P. and
G.E. Canada Equipment Financing G.P.

Mtre Jean Legault

500-11-040494-110
500-17-064825-113

PAGE: 19

LAVERY DE BILLY
For the Canadian Imperial
Bank of Commerce

Mtre Michel La Roche
La Roche Rouleau
For the Laurentian Bank
of Canada

Dates of hearing:	November 21, 22 and 23, 2011
Date taken under advisement:	November 23, 2011

SCHEDULE A

Note 6

Bank Act (SC 1991, c 46)

Deposit Acceptance

437. (1) A bank may, without the intervention of any other person, (a) accept a deposit from any person whether or not the person is qualified by law to enter into contracts; and (b) pay all or part of the principal of the deposit and all or part of the interest thereon to or to the order of that person.

Exception

(2) Paragraph (1)(b) does not apply if, before payment, the money deposited in the bank pursuant to paragraph 1(a) is claimed by some other person:

(a) in any action or proceeding to which the bank is a party and in respect of which service of a writ or other process originating that action or proceeding has been made on the bank, or

(b) in any other action or proceeding pursuant to which an injunction or order made by the court *requiring* the bank not to make payment of that money or make payment thereof to some person other than the depositor has been served on the bank;

and, in the case of such claim so made, the money so deposited may be paid to the depositor with the consent of the claimant or to the claimant with the consent of the depositor.

Notes 7, 45, 49

Bankruptcy and Insolvency Act (RSC 1985, c B-3)

Property of the bankrupt

67. (1) The property of a bankrupt divisible among his creditors shall not comprise:

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph a) or b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph a or b

(b.3) without restricting the generality of paragraph b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise:

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Deemed trusts

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

Exceptions

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Note 8

Bankruptcy and Insolvency Act (RSC 1985, c B-3)

Persons claiming property in possession of bankrupt

81. (1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

How claim disposed of

(2) The trustee with whom a proof of claim is filed under subsection (1) shall within 15 days after the filing of the claim or within 15 days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or send notice in the prescribed manner to the claimant that

the claim is disputed, with the trustee's reasons for disputing it, and, unless the claimant appeals the trustee's decision to the court within 15 days after the sending of the notice of dispute, the claimant is deemed to have abandoned or relinquished all his or her right to or interest in the property to the trustee who may then sell or dispose of the property free of any right, title or interest of the claimant.

Onus on claimant

(3) The onus of establishing a claim to or in property under this section is on the claimant.

Require proof of claim

(4) The trustee may send notice in the prescribed manner to any person to prove his or her claim to or in property under this section, and, unless that person files with the trustee a proof of claim, in the prescribed form, within 15 days after the sending of the notice, the trustee may then, with the leave of the court, sell or dispose of the property free of any right, title or interest of that person.

No other proceeding to be instituted

(5) No proceedings shall be instituted to establish a claim to, or to recover any right or interest in, any property in the possession of a bankrupt at the time of the bankruptcy, except as provided in this section.

Rights of others not extended

(6) Nothing in this section shall be construed as extending the rights of any person other than the trustee.

Note 11

Civil Code of Québec (SQ 1991, c 64)

6. Every person is bound to exercise his civil rights in good faith.

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

1375. The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.

1376. The rules set forth in this Book apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them.

Note 15

Interpretation Act (RSC 1985, c B-3)

Duality of legal traditions and application of provincial law

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

Terminology

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

Note 17

Bankruptcy and Insolvency Act (RSC 1985, c B-3)

Precedence of bankruptcy orders and assignments

70. (1) Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor's representative, and except the rights of a secured creditor.

Costs

(2) Despite subsection (1), one bill of costs of a barrister or solicitor or, in the Province of Quebec, an advocate, including the executing officer's fees and land registration fees, shall be payable to the creditor who has first attached by way of

garnishment or filed with the executing officer an attachment, execution or other process against the property of the bankrupt.

Note 44

Bankruptcy and Insolvency Act (RSC 1985, c B-3)

Definitions:

2. (1) In this Act,

"property"

"*bien*"

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property.

TAB 3

Ontario Supreme Court
Lloyd's London, Non-Marine Underwriters v. National Armoured Ltd.
Date: 1996-11-28

Moss et al.

and

National Armoured Ltd. and two other actions

Court File Nos. B135/94/73803/93; B138/93/93-CQ-36181; 98-CQ-44301

Ontario Court (General Division), Sharpe J. November 28, 1996.

Action No. B135/94/#73803/93

Ian H. Fraser and Marcia C. Green, for plaintiffs, Michael Moss, an underwriter at Lloyd's, England, on behalf of himself and all those other Lloyd's underwriters subscribing to insurance policies numbered 009A92131, 009A92132 and 009A92133.

No one appearing on behalf of the defendant, National Armoured Ltd.

Action No. 93-CQ.-36181

Hugh G. Brown and Pamela Large-Moran, for plaintiffs, Canadian Capital Corporation et al.

Ian H. Fraser and Marcia C. Green, for defendant, Lloyd's.

Action No. 93-CQ-44301

Richard H. Krempulec, Q.C., for plaintiff, Famous Players Inc. Ian H. Fraser and Marcia C. Green, for defendant, Lloyd's.

SHARPE J.:—INTRODUCTION

[1] On November 29, 1992, a robbery occurred at the premises of National Armoured Ltd. ("NAL") in Concord, Ontario. Over \$8 million was stolen. Following the robbery certain individuals, including two NAL employees and another individual involved in the affairs of NAL, were arrested and charged with the robbery. However, by the time of this trial, the robbery charges had been dropped. The proceeds of the robbery have not been recovered. At the time of the robbery, NAL was insured under three armoured car carrier policies dated September 9, 1992 by a Lloyd's syndicate ("Lloyd's"). The three policies were for "basic liability" of \$5,000,000; "excess liability" of \$5,000,000 and "loss of interest" of \$75,000.

[2] Before me, three actions were tried together. In two actions, customers of NAL whose property was stolen in the robbery sue Lloyd's asserting both derivative claims as well as

claims as unnamed insureds with direct rights of action under the policies. The claims against all defendants other than Lloyd's had been resolved prior to this trial. Lloyd's denies that the customers have any direct rights independent of NAL and disputes their derivative claims on the ground that it properly voided the NAL policies *ab initio*. In the third action, which was undefended, Lloyd's sues NAL for a declaration that it validly voided the policies. In that action and in its defence to the actions brought by the customers of NAL, Lloyd's asserts that it was entitled to void the policies on the grounds of misrepresentation and non-disclosure of material facts. Lloyd's also contends that it is entitled to void the policies or deny any claims on the ground that NAL itself participated in the robbery, failed to cooperate with the investigation following the robbery and submitted false claims.

ISSUES

[3] In view of the pleadings, evidence and argument, the following are the issues to be resolved by me:

1. Did NAL make material misrepresentations of fact at the time it obtained insurance from Lloyd's
 - (a) with respect to its establishment and claims history
 - (b) with respect to the role and position of William White
 - (c) with respect to the ownership of the company
 that would justify Lloyd's in voiding the policies *ab initio*?
2. Did NAL fail to disclose facts material to its insurance
 - (a) with respect to alleged "cash lapping"
 - (b) with respect to alleged "cheque kiting" and if so, did such non-disclosure justify Lloyd's in voiding the policies *ab initio*?
3. Did Lloyd's fail to exercise due diligence in underwriting the risk and does such failure deprive Lloyd's of the right to rely on the above grounds to void the policies?
4. Did NAL fail to cooperate in the post-robbery investigation and does such failure justify Lloyd's in voiding the policies?
5. Did NAL submit a fraudulent claim following the robbery so as to justify Lloyd's in voiding the policies *ab initio*?

6. Did NAL itself stage or participate in the alleged robbery so as to justify Lloyd's in voiding the policies or deny any claims?

7. To the extent that any of the above grounds are established by Lloyd's, do they affect the rights of the customers

(a) pursuant to s. 132 of the *Insurance Act*, R.S.O. 1990, c. I.8

(b) as "loss payees" under the policies?

8. Do the customers have any rights against Lloyd's independent of NAL as "unnamed assureds" or otherwise that are not affected by the above grounds?

9. If the customers have any such rights, is Lloyd's entitled to deduct from the claims amounts recovered by the customers under other insurance policies in respect of the loss?

FINDINGS

1. *Background Facts*

(a) National Armoured Ltd.

[4] The history of NAL and the involvement of the two individuals who have had equity ownership interest in that company, Steven McCormack and William Whyte, dates back to 1979. McCormack was called as a witness by Lloyd's. Although Whyte's name is prominent in the story, he was not called to testify at trial. In 1979, McCormack, now a partner with a large Toronto law firm, was called to the bar. His account of the evolution of NAL is as follows. In 1979, he met Whyte as a result of doing work for a union of which Whyte was an officer. Since that time, McCormack and Whyte have remained friends with joint interests in various aspects of the armoured car carrier business. In 1979, McCormack also did some legal work with a courier company called Cache

[5] Courier Services. After the death of Kevin Boyd, the principal of Cache, McCormack, Boyd's widow, Whyte and John Forsythe each invested \$10,000.00 to carry on the company in the armoured car carrier business. McCormack sold out his interest in Cache in 1982 or 1983 but Whyte maintained his interest for some period thereafter.

[6] In the mid-1980's, McCormack again became involved in a business venture with Whyte. Whyte adopted a design for an armoured vehicle involving the use of interior fibreglass

armour. This produced a vehicle without the exterior appearance of an armoured car. A company called "Armet Armoured" was incorporated to manufacture these vehicles. McCormack invested \$2,500.00 in Armet. He claims to have had very little involvement in its affairs and no expertise in the product. The company prospered, selling vehicles to Cache and its successor companies as well as to other buyers.

[7] Whyte subsequently developed a concept of having armoured vehicles serve as mobile "money marts". The idea was to have vehicles go to remote locations to permit employees to cash pay cheques. As a consequence, Armet was renamed "Cheque Express" but it would appear that the concept was never fully developed.

[8] Cheque Express was renamed National Armoured Ltd. in 1990 when it acquired the assets and undertaking of an insolvent entity known as National Armoured Inc. ("NAI"). NAI was the successor corporation of Cache Courier, the company with which McCormack and Whyte had been involved in the early 1980's. Cache Courier, it would appear, was sold three times. As a result, it was renamed Armoured Transport Car Ltd., then National Armoured Transport Canada Inc. and finally National Armoured Inc. The principal behind NAI was George Fullerton. The corporate records indicate that his daughter, Sharman Fullerton, was the president of the corporation. Sharman Fullerton is the wife of William Whyte. The precise extent of Whyte's involvement with NAI is unclear. He appears to have had no formal title with the company nor any personal equity interest in its ownership. However, there was the close family connection and NAI operated from the same condominium commercial development in which Whyte operated Armet and a number of other business interests.

[9] McCormack appears to have had no direct involvement with NAI although he was approached by George Fullerton in connection with a contract dispute with the Liquor Control Board of Ontario. McCormack helped Fullerton's attempt to resolve the matter at the political level but without success. The loss of the

[10] contract appears to have been one of the principal causes leading to the insolvency of the company.

[11] When NAI became insolvent in 1991 (it is not clear from the evidence whether there was an actual bankruptcy), Whyte approached McCormack and suggested that he might wish to get back into the armoured car business. McCormack was very attracted by what he saw

as a good business opportunity. The company in which he already had an interest, Armet/Cheque Express changed its name to “National Armoured Ltd.”, acquired all of NAI’S assets and effectively took over the operation of its business. McCormack’s evidence was extremely hazy on the details of this transaction. It was his evidence that there was little or no documentation other than a bill of sale and that the purchase price was \$100,000.00. This was financed by a loan from George Fullerton who held a secured interest in the assets of NAI and owned the premises out of which that company operated. McCormack’s evidence is that he made no further investment in the company at that time or at any subsequent time.

[12] NAL effectively took over the operation and organizational structure of NAI. The employees of NAI were hired by NAL, including Alan Wood who was given the title Vice President and the mandate to operate the company on a day-to-day basis. Wood, who was called as a witness by Lloyd’s, has a long-standing association with Whyte which continues up to the present. Wood started in the armoured carrier business in 1985 with Cache Courier, and continued with the various entities which acquired the business, Armoured Transport Car Ltd., National Armoured Transport Canada Inc., NAI and finally National Armoured Ltd.

[13] The question of the extent of Whyte’s involvement in NAL is an important aspect of the misrepresentation issue. I will turn below to the details of what Lloyd’s was told at the time the insurance was arranged. McCormack and Wood both testified that Whyte was accurately described as a “consultant”. It was McCormack’s evidence that Whyte did not want to be actively involved in the armoured carrier business for two reasons. First, Whyte wanted to focus his efforts on the manufacturing business and thought that potential customers would not purchase his vehicles if he was a competitor in the carrier business. Second, McCormack stated that Whyte’s family situation was complicated by virtue of the fact that his father-in-law, George Fullerton, had lost money in the bankruptcy of NAI.

[14] McCormack further testified that in light of Whyte’s desire not to be directly involved in the business, a trust arrangement was entered with respect to Whyte’s shares. Whyte introduced

[15] McCormack to Marcel Gagnier who was to become the president of NAL in its early days. I will return later to the extent of Gagnier’s role but at about the time he was hired, in August 1990, the share record of NAL indicates that he became a shareholder. It is clear from Gagnier’s evidence that he paid nothing for these shares and according to McCormack, the

shares Gagnier received were pursuant to a trust arrangement whereby Gagnier would hold his shares on trust for William Whyte. Pursuant to another trust agreement, Gagnier's shares were shortly thereafter transferred to McCormack. Whyte remained the beneficiary of the trust arrangement.

[16] The other effect of the transfer of shares relates to the percentages of the interests held by McCormack and Whyte in NAL. At the time NAL had acquired the armoured carrier business of NAI, McCormack owned 25% and Whyte owned 75% of the shares. According to McCormack, Whyte felt that he was entitled to a greater share as he had done most of the work with respect to the manufacturing operations and that a more appropriate split would be 85% to Whyte and 15% to McCormack. The share transfer involving Gagnier and the trust arrangements described above also effected this change. The net result was that McCormack was the sole registered shareholder with legal title to 100% of the shares. However, McCormack's beneficial interest was only 15%, the remaining 85% being beneficially owned by Whyte pursuant to the trust arrangements. McCormack stated that he drafted these trust agreements but could not find any copies of the documents. He also explained that the arrangement was structured in this way because that was how Whyte wanted it done.

[17] Subsequently, at a point in time which McCormack was unable to fix with any degree of precision, McCormack says that Whyte took the position that he would surrender any claim he held to the shares in NAL in exchange for sole ownership of Armet Armoured Vehicles Inc., the entity Whyte had incorporated to carry on the manufacturing business. At the time and up until the present, McCormack disputes that he surrendered any interest he had in the Armet venture. It was McCormack's evidence that while Whyte claims to have surrendered any interest he had in NAL, McCormack did not accept the other side of the deal namely, that he had surrendered his interest in Armet. McCormack's evidence was that there was no written documentation of Whyte's purported withdrawal from any beneficial ownership in National Armoured Ltd.

(b) Related Companies

[18] A number of corporate entities were related to NAL or the individuals who worked with and for NAL. In view of the allegations of cheque kiting and cash lapping, these entities and the individuals behind them are relevant.

[19] The Montreal operation of NAL was conducted by 2640-8377 Quebec Inc. The corporate records indicate that Frank Ragni was the president of that corporation and that Jean Parmentier was a director. Ragni is closely associated with Whyte. Ragni was described by various witnesses as Whyte's "right-hand man". Ragni worked with the Canadian Union of Restaurant Employees, a union headed by Whyte. Ragni had no formal title with NAL. However, according to Alan Wood, Ragni undertook certain tasks on behalf of NAL. He occasionally served as a driver, did deliveries, assisted with accounts receivable and "arranged loans". As will be seen, serious allegations are made with respect to Ragni's involvement in the alleged cheque kiting scheme, cash lapping scheme and the robbery of NAL itself.

[20] The corporate records of Whyte's company Armet Armoured Vehicles Inc. indicate that Whyte was the president until October 4th, 1991. From that point Jean Parmentier is listed as president and director. While Jean Parmentier is shown as having senior positions with both Armet and the numbered Quebec company, the evidence before me was that rather than carry out executive functions, he dealt with vehicle maintenance for NAL. John Fullerton, son of George Fullerton and Director of Security of NAL, is shown as an incorporating director and Frank Ragni is shown as treasurer and director of Armet.

[21] Armet sold vehicles to a company called Alexdor (Rentals) Ltd. which in turn rented them to NAL. Sharman Fullerton, Whyte's wife, is shown as president and director of Alexdor and John Fullerton is shown as secretary and director. Janal Wood Inc. was formed to provide NAL with personnel. This company is owned by Alan Wood.

[22] With the exception of the numbered Quebec company, the offices of these companies were located in the same condominium complex as that occupied by NAL and in close proximity to the office of William Whyte around whom the affairs of these various entities appear to revolve. In addition, offices of the Canadian Union of Restaurant Employees, headed by Whyte and for which Ragni worked, were in the same location as was the office of Prestige Plan Administrators Inc. The latter corporation was owned by Whyte. Ragni was listed as its secretary and Jean Parmentier was shown as its director and president. A number of the witnesses identified the company as apparently belonging to Sharman Fullerton. It provided a benefit plan for the employees of NAL.

2. Placement of Insurance

(a) Representations to Wright of Kelly Associates

[23] Until September 1991, NAL had armoured car carrier liability insurance arranged through W.H. McGee and Company, underwriters in New York. This continued the liability insurance of NAL. At all times relevant to this action, Alan Wood had primary responsibility for arranging insurance and dealing with insurance issues on behalf of NAL. In 1991, Wood was Vice-President of NAL and responsible for its day-to-day operations. From February 1992 on, Wood was the company's President with similar authority.

[24] In the spring of 1991, it became clear that NAL would have to find another carrier for its insurance. Wood testified that he was advised by McGee that they were reducing NAL coverage from \$5 million to \$1 million. However, it would appear that he was in fact advised in writing that McGee was terminating the coverage. The precise reason for the non-renewal by McGee is unclear. There was some suggestion that the Toronto office of McGee was getting out of the armoured car area. There was also evidence, reviewed below, to the effect that the New York office of McGee, in particular the individual responsible for this area of McGee's business, Jerry Ippolito, was concerned about the level of involvement of Whyte in NAL's operation.

[25] Prior to August, 1991, Wood made enquiries of three or four different brokers before meeting with Peter Wright of Kelly Associates Inc., a broker with offices in Connecticut which specializes in the armoured car area.

[26] Wright, who testified on behalf of Lloyd's, described his role as that of an independent agent or broker which finds clients and then presents those clients to insurance markets with a view to arranging coverage. His company is paid a commission when the insurance is arranged. Wright specializes in insurance for privately owned armoured carriers. He estimates there to be approximately 150 armoured carriers in North America and in 1991 his company represented approximately 50 of them. Ninety-percent of his work is devoted to this area. In 1991, there were only two markets for this insurance, one being the W.H. McGee and Company underwriters in New York and the other being four or five Lloyd's syndicates in London.

[27] Wright first learned of NAL's insurance problems from a business associate, Bill Cole, who performed inspections and surveys of armoured carriers on behalf of McGee and other

insurers. Cole told Wright that he had done several inspections of NAL and that the company was having problems with its competitor, Brinks. Wright was familiar with what he described as negative campaigning by Brinks in relation to insurance. In April 1991, Wright sent Alan Wood (whom he had previously met at armoured carrier conventions) a package of information Wright had prepared to combat a similar Brinks campaign in the United States. After later learning from Cole that McGee was not renewing the NAL policy, Wright wrote to Wood on August 8, 1991, describing his company's services.

[28] It was Wright's evidence that Cole was unable to explain a reason for McGee's non-renewal. Wright was in regular contact with Jerry Ippolito of McGee and testified that when he asked Ippolito for an explanation for the non-renewal, Ippolito gave no clear response. However, as a result of his conversation with Ippolito, Wright learned of a loss suffered by Cache Courier when Whyte was running the company. The insurer denied coverage on the ground the vehicle was not armoured. While Whyte maintained that the vehicle was in fact armoured, the claim was not pursued with the insurer and Ippolito was suspicious. Wright formed the view that Ippolito had become preoccupied with a concern about Whyte and this incident and that this had something to do with the refusal by McGee to renew the policy.

[29] In his letter of August 8, 1991 to Wood, Wright emphasised the expertise his company had in the area and stated as follows:

Our London facilities produce manuscript policy forms tailored to individual needs without warranty or exception. We utilize no application/proposal forms. We require no signatures warranting to the continued accuracy of statements or indicating understanding of conditions precedent to liability.

[30] At trial, Wright testified that this referred to the manner in which the Lloyd's market operated and in particular to the fact that it was Wright's practice to obtain the information from a prospective client and relay that information by way of letter to the London broker for presentation to a Lloyd's underwriter. Other brokers used a standard form which posed certain questions and on which certain answers were recorded. Wright's method held out the advantage that specific statements with respect to details of operation did not become contractual terms, Wright's evidence was that the method he used was a selling point in relation to the Brinks campaign. Brinks had focused on instances where coverage had been

denied because certain specified terms in written proposals (for example the precise number of guards to accompany each delivery) had not been met.

[31] On August 19, 1991 Wright came to Toronto to meet with NAL representatives and review the premises. Wood was clearly the individual at NAL who had primary responsibility for arranging insurance. McCormack's evidence was that he had some discussion with Wood on this issue and that he may have discussed the Brinks issue with Whyte. It is clear, however, that Wood was fully authorized on behalf of McCormack and NAL to arrange the insurance. Wood understood that Wright had direct access to the London market and that the purpose of Wright's mid-August visit was to evaluate the risk. Wood stated that he understood that Whyte would have to supply information he obtained from NAL to the London market but Wood thought this would be done directly and the company was anxious to arrange insurance as they were running out of time.

[32] On August 19, 1991, Wright met Wood for breakfast, talked to him generally about the business and then went to the premises of NAL for a tour. While there, Wright met Whyte who was introduced to him as the owner of Armet and a "consultant" to NAL. Whyte described the construction of the armoured vehicles used by NAL in detail. This was a matter of some considerable interest to Wright because of the allegations concerning the loss suffered by Cache Courier. Wright discussed this loss with Whyte. Whyte showed Wright the type of armour and explained that while the police report had indicated the vehicle was not armoured, this was wrong but that it simply was too late in the process to refute the allegation. Wright's tour of the NAL premises included an examination of the vault, alarm system, cameras, security areas, and the like. He also reviewed crews, routing, special customers, amounts carried and amounts held in the vault over-night, all important matters in relation to insurance. Wright stated that Tom Phillips of Matthews and Associates, NAL's local broker was with him for most of the day. While at NAL, Wright also met Marcel Gagnier, introduced to him as the company's president.

[33] Wright was taken downtown to lunch to meet Steven McCormack who was introduced to him as the owner of NAL. While McCormack's evidence was that he could not recall how he was introduced to Wright, there can be no doubt that he was in fact introduced as the owner. It is clear from Wood's evidence that the purpose of the trip downtown to meet McCormack for lunch was so that Wright could meet the owner. It is also the evidence of

Wood and Wright that Whyte was present at the lunch, although McCormack did not think this to be the case. There is little doubt that Whyte was present at the lunch, but even if he was not, Wright, Wood and McCormack all testified that during the lunch Whyte's role was described as that of long-time friend of McCormack and a consultant in the armoured car business. Although McCormack's recollection is vague, I find that the matter of the Cache Courier loss was discussed during the lunch as that is the specific recollection of Wright and Wood accepted in his evidence that it might well have been discussed. I also find that McCormack participated in the discussion and that the matter of the inability of a potential litigant to sue on a contingency basis in Ontario was offered as one explanation of why the Cache Courier loss had not been pursued further.

[34] Both Wood and McCormack testified that their conversations with Wright were of a rather casual nature, that Wright did most of the talking and that Wright did not appear to be running down a checklist. However, it is apparent from the letter Wright wrote following his visit that he assembled a significant amount of information regarding NAL and its operations and that the information contained in his letter was provided by Wood, McCormack and Whyte.

[35] That letter, dated August 21st, 1991 was addressed to Paul Parkinson of Robert Fraser Insurance Brokers Ltd., the London Lloyd's broker who would present the risk to a Lloyd's underwriter. In light of the allegations of misrepresentation raised by Lloyd's as a basis for voiding the policies and as this letter represented all, or virtually all, of the information upon which the Lloyd's underwriter based his decision to accept the risk, it is of obvious significance. The letter appears to consist of five pages, although, as there is no signature on the final page, there may have been a short concluding page which has been lost. Attached to the letter is certain information regarding the vehicles used by NAL.

[36] The letter is written in a conversational style and it is obvious that Wright was presenting NAL in a favourable light in order to attract the interest of the underwriter. For instance, much was made at trial of the first sentence of the letter which reads "I think it possible that I may have stumbled across a jewel in the rough." Wright goes on to explain his contact with Cole, the manner in which he learned of NAL and that McGee had decided not to renew its coverage. Wright relates that he got no explanation of this from Jerry Ippolito of McGee and then goes on to explain his visit to NAL and the information he gained. He sets

out in some detail the suspicions of Jerry Ippolito concerning Bill Whyte and in particular a suspicion that Bill Whyte is involved in some significant way with NAL. Wright stated: "The fact is that Bill Whyte is involved with National Armoured as a consultant." He goes on to explain Whyte's long-standing friendship with McCormack and that he is the manufacturer of vehicles used by NAL. Wright explained the circumstances surrounding the Cache Courier loss and concludes the discussion of this issue as follows: "All I'm saying is that I am now fully conversant, I believe, with the history of the people involved and that this risk is not some mysterious creation of Whyte's design to circumvent McGee's eagle eyes."

[37] The letter then describes in some detail the operations of NAL, the nature of its physical premises, its procedures, its routing and the value of property carried and stored.

[38] The truth of a number of statements of fact contained in the letter is at issue. First is that Whyte's relationship with NAL was that of consultant. Wright also reported that "the current owner of National Armoured Ltd. is Steve McCormack, senior partner at Toronto's largest law firm". Wright also wrote "National Armoured Ltd. is the successor to National Armoured Inc. and was founded in May 1982." Wright also stated that NAL "would make an excellent addition to our Mike Moss facility as this risk has been completely loss free since its inception".

[39] The letter gives no detail with respect to the financial situation of NAL but Wright did report that "current total gross revenues are \$1,550,000.00". Wright reported that McCormack was the owner of the premises out of which NAL operated. Wright made a point in his letter of indicating Cole's favourable assessment of NAL, the fact that he had done several inspections, and he also added that Charlie Allen had inspected the premises and operations on behalf of the independent Armoured Car Operators Association. It was explained in evidence that this association requires a member to inspect the premises of an applicant with a view to determining whether its operations are satisfactory. Wright also indicated that he could secure a copy of Cole's reports at minimal cost.

[40] While considerable argument was addressed to the question of whether Wright was acting as agent for Lloyd's or as agent for NAL, a subject to which I will return, I have no hesitation in finding that the contentious facts indicated above were supplied to Wright by Wood and McCormack. I have already dealt with the source of the information as to Whyte's status as a consultant and as to McCormack's status as owner. At trial, Wood conceded that

he believed McCormack to be the owner of the premises on which NAL was located although, in fact, the owner was George Fullerton. He also conceded that at the time he understood McCormack to be one of the fourteen individuals responsible for the management of his law firm. This explains the source of the erroneous statements in Wright's letter that McCormack was a senior partner and that he owned the premises in question. There can be no doubt but that Wright was told that NAL was the "successor" to NAI and that it was founded in 1982. Wood did not deny this at trial and that such information would have been provided is confirmed by a written insurance application he completed days prior to Wright's visit which contains the same information. Similarly I am satisfied that Wright was told that the risk had been "completely loss free" since its inception.

[41] It was Wright's evidence that he would have been much less comfortable had he believed Whyte to be an owner or part owner. He assumed from what he had been told that NAL was essentially the same entity as NAI and that what was involved was a change of name. Moreover, the representation that there had been no losses since 1982 was an important factor. Wright testified that had he known the company had been in business only two years following an insolvency or bankruptcy, he would have certainly have asked for much more detail.

[42] Shortly after the Lloyd's broker received the August 21 letter, he presented it to Michael Moss at Lloyd's. It was then learned within a day or so that NAL had another submission before underwriters on the floor of Lloyd's in the form of the written proposal form completed by Wood and mentioned above. It was clear from Wood's evidence that he understood precisely the purpose of this form and that it would be relied upon by insurers. The form contained the same representation that NAL had been established since 1982. Wood's explanation for that statement was that he was referring to McCormack's experience in the industry. It was also his evidence that he thought Wright and Phillips were aware of these facts. He could not recall telling Wright about the bankruptcy of NAI but stated that Cole was aware of that fact and that he therefore concluded that Wright would have acquired full information from Cole. Wood also admitted that he knew that the form would be passed to Wright when he requested it from Phillips.

(b) Acceptance of the NAL Risk by Lloyd's

[43] Michael Moss, the lead underwriter at Lloyd's who accepted the NAL risk, testified on behalf of Lloyd's. He has been in the insurance business since 1975. He has been an active underwriter since 1983 and was head of the syndicate named in this proceeding from 1988 until it closed in 1991. He has been with another syndicate since. For some time his work has been primarily in the cargo and specie area which includes armoured carrier insurance.

[44] Moss explained the manner in which risks are accepted at Lloyd's. To place business at Lloyd's one has to be a registered Lloyd's broker. The chain of information is from the client to its local broker then to a Lloyd's broker in London and then to the underwriter. In the present case, the Lloyd's broker was Robert Fraser Insurance Brokers Ltd. Kelly was an intermediary and Matthews was the producing broker. Underwriting at Lloyd's is done in the following fashion. Underwriters sit at "boxes" or desks. They are approached by a broker with a particular risk. The broker presents a "broker's slip" which is a folded card setting out the basic details of the risk and the basic conditions of the insurance. Additional information is provided by way of written proposal. There is an enormous variation in the form of information presented to a Lloyd's underwriter. Sometimes typed signed forms are presented and sometimes the submission is a letter drafted by the producing broker. In Moss's experience in the armoured carrier business, a typical submission is a 3-4-page letter. He examines the letter and decides if he was able to assess the risk. The initial assessment of a new risk would take approximately 15 minutes. If satisfied that the risk should be accepted, the next step is to set the premium. If he refuses the risk, the broker might go to another underwriter or to another market. It would be rare for a broker to leave the submission with him for his review. If it looked like the risk was acceptable but more information was required, the broker would be asked to provide that information.

[45] If the insured accepts the premium quoted the next step is to instruct the broker to place the risk. The broker returns to the lead underwriter who sets the terms and premiums for any given risk. The lead underwriter signs the slip and writes the percentage of the risk accepted. The broker then proceeds to seek the support of other underwriters until 100% of the risk is placed. Facilities by way of "line slip" are available to brokers who place a lot of business in the same area. A line slip facility permits the broker to deal with only two or three underwriters as the other underwriters have agreed to follow. In the absence of a "line slip", the risk is placed in "facultative" manner which means that the broker must go to all

subscribing underwriters. Kelly and Fraser had a line slip facility which was used to place the NAL risk.

[46] Once the risk is placed, the broker will confirm this to the client and send a cover note. A “signing slip” is then prepared. This is a typed version indicating the percentages and syndicates involved. It is returned to the underwriters for signatures and then presented to the Lloyd’s policy office for collection of the premium. Policies are put together in brokers’ offices in line with the terms and conditions noted on the slips. If wording needs to be approved, the broker is required to get agreement from the lead underwriters. This information goes into a policy form or jacket and the Lloyd’s office prepares the policy and sends it to the insured.

[47] Moss testified that in 1991, the armoured carrier market was comprised of two types of coverage. First, there was all risk carrier liability available to carriers. Second, there was “contingent interest” or “guaranteed pay interest” policies available to customers of carriers who wanted additional comfort. The “guaranteed pay interest” was a McGee wording which provided that in the event of a loss, the policy pays the customer first and the underwriter is then subrogated to the customer’s interest as against the carrier. A contingent interest policy provides that if there is a shortfall after the adjustment of the carrier’s coverage, the customer can recover the shortfall from the policy. Both of these are first party policies to benefit the customer. It is clear that the policies at issue here did not contain these specific provisions.

[48] Moss described the market for armoured carrier insurance as global. He does business in Europe, Asia, Australia, South Africa as well as North America. His focus as a lead underwriter is restricted to North America. The North American market is comprised of three sectors. First, there are the “nationals” or large carriers such as Brinks and Wells Fargo. Second, there are regional carriers and third, there are local independent carriers usually restricted to one metropolitan area but sometimes operating in one or two towns. There are approximately 150 local carriers. The quality of their operations ranges enormously.

[49] Moss focused on the larger independent carriers. In 1991, there were two markets for this insurance. First, there was McGee in New York and second, there was the London market in which four or five underwriters would lead. In 1991, Moss’s share of the market was comparable to the others. It would be much larger now. In 1991, the North American market for independent operators was serviced by three producing brokers, one of which was Kelly

and Associates. Moss had dealt with Kelly for some time, although until 1991, most of Kelly's primary risk was placed with McGee in New York and Moss provided excess cover.

[50] Moss described the underwriter's decision-making process as to whether to accept a risk. First and foremost, the decision was a qualitative one and taken before any thought was given to the premium. He would look at three areas in a submission for armoured carrier insurance. First, was the physical plant including terminals, vehicles, alarms and locks. Second, was the area of operational procedures to ensure that the people handling the money were doing so under proper procedures providing tracking throughout. Third, was the question of moral risk, namely, the competence and character of the people involved in the management. He described this as a very important factor because most losses in the area had resulted from a lack of moral fibre on the part of individuals in the business. He stated that it was necessary to have a feel for the people involved. The first two factors helped assess moral risk. If the plant was run down it indicated money was not being invested and, similarly, if operational procedures were slack it indicated that the management was not sound. The other area to be considered were the details regarding exposure, namely, the number of routes, the amounts carried, the mix of cash and cheque and the average and maximum holdovers in the vault.

[51] Moss explained that surveyors' reports are prepared by trained security surveyors who inspect the entity that was placing the insurance. Surveys are done at the request and expense of an underwriter. If an underwriter decides to request a survey report, he would accept the risk and even set the premium but do so subject to survey. Sometimes reports have recommendations and in that case, the underwriter can withdraw the quotation if the recommendations are not implemented. Moss did not obtain the survey report of Cole, although he did place some reliance on the fact that Cole was positive about NAL.

[52] Moss testified that he had never seen a surveyor deal with a question of moral hazard, but that most surveyors dealt with the questions of physical plant and operational procedures. Moss did not obtain "Dunn and Bradstreet" reports as he did not consider them reliable, nor did he ask for financial statements. He did, however, look at the revenue figures which, taken together with the number of routes, provided a picture of the viability of the operation.

[53] The written proposal of August 21, 1991 that Moss received through the London broker from Wright was in the usual form. He preferred this sort of letter to forms. Moss felt that the

information was better and that given Kelly's experience, he felt he could be certain that the right questions had been asked.

[54] Moss was asked to review the facts set out in the letter and to identify those he considered to be material to the risk. He thought that the McGee non-renewal was significant but not material. He stated that sometimes underwriters decisions in North America were hard for Lloyd's underwriters to understand. The positive comments of Bill Cole and Charlie Allen were material. The fact that the owner of the company was a senior partner in a large Toronto law firm was significant but not material. This information did go toward building a positive picture. Moss stated that Whyte's status was material. Moss understood that Whyte was involved but not running the company and that he was providing consulting services on occasion. He testified that had he been aware that Whyte was running the company he "won't have gone near it with a barge pole". He felt that the explanation given of the Cache loss and Ippolito's decision not to renew was plausible. He understood "successor" to mean a change of name and thought that the company had been in operation under one single management since 1982. The fact that the owner of the company owned the premises was significant but not material. It did add to a picture of solidity. The description of the premises was material; the description of the exposures was material and the description of the Montreal and Ottawa operations was material. The figure given for gross revenues was significant but not material. It did give an idea as to what the company was turning over. The description of the president Marcel Gagnier as a military officer who brought order and discipline also helped to build a picture of responsible management. The statement that the company had been completely loss free since its inception in 1982 was material.

[55] After seeing this submission he did not see any other material and the matter was left to his deputy to consider the premium. Certain specific questions were posed regarding values carried and eventually the risk was accepted.

[56] A year later, in September, 1992, the process for renewing the policies was the same although the information required would concentrate more on exposure and loss history. Moss interpreted the submission from Wright's firm, a short letter dated September 1, 1992 as saying that nothing significant had changed from the date of the initial submission. That letter did indicate that "Steve McCormack, who is a senior partner at one of Toronto's largest law

firms and is also the current owner of National Armoured” had written to advise that Wood had been named President and Chief Executive Officer of NAL.

Issue 1. Did NAL make material misrepresentations of fact at the time it obtained insurance from Lloyd's

- (a) with respect to its establishment and claims history
- (b) with respect to the role and position of William White
- (c) with respect to the ownership of the company that would justify Lloyd's in voiding the policies ab initio?

[57] In my view, the evidence establishes beyond any serious doubt that there were material misrepresentations of fact made by NAL to Lloyd's. Those misrepresentations concern the three related issues of the history of NAL and its claims history, the role of Bill Whyte in its management, and the question of ownership.

(a) Establishment of National Armoured Ltd. and Claims History

[58] It is clear that NAL was not in operation since 1982. While the corporate entity, under previous names, had some history in the armoured carrier business through the Cache Courier venture, that history was not continuous since 1982. Moreover, that history was not loss free. If NAL wished to rely on its history under previous corporate names, it surely had to take into account the Cache Courier loss which was the subject of Wright's enquiries. Wright and Moss were quite clearly under the impression that Cache Courier was a separate and distinct entity. NAL cannot have it both ways. If it was in fact separate and distinct, then NAL was not “established in 1982”. If it was not a separate entity, NAL was not “loss free”. Moreover, it was McCormack's evidence that there was another loss after he had sold out his interest in Cache while it was in the process of being sold to another entity. That claim had been paid. Wright was not told of that loss. Nor was Wright told of the insolvency of NAL. In my view, NAL was not entitled to assume, as Wood suggested, that Wright must have known this from Cole. I find rather that Wood presented to the underwriter, through Wright, a misleading and incomplete picture of the history of NAL. The important matters of the insolvency, the nature of the connection with NAI and prior entities and prior losses were not disclosed. The failure to disclose those facts made the representation that NAL had been in

operation since 1982 and that it was completely loss free for that period a misrepresentation of fact.

[59] I find as well that this misrepresentation was material to the risk the underwriter was being asked to assume. Both Moss and

[60] Wright identified the history and claims record as material and the expert witness called by the customers, John Lewington confirmed that these matters were material to the risk.

(b) Role and Position of William Whyte

[61] The second fact that was misrepresented was the nature of Whyte's role with National Armoured. While McCormack and Alan Wood insisted in their evidence at trial that Whyte was no more than a consultant, I find that to be inconsistent with the evidence as a whole.

[62] Based on the manner in which McCormack gave his evidence, and on the substance of what he said, I find that McCormack's evidence was not entirely reliable. His answers were frequently evasive. He expressed great difficulty in recalling facts which might now be embarrassing, yet remembered with greater precision facts more helpful. With respect to the former, he had to be reminded on a number of occasions of more precise evidence he had given when he was a party and had been examined for discovery. I had the distinct impression from his demeanour and the manner in which he responded to questions, particularly with reference to the role of Whyte at NAL, that he was not being entirely candid with the court.

[63] McCormack went to some considerable pains to distance himself from the day-to-day operations of NAL. He insisted that he was very much an absentee owner who had minimal involvement with the company. He testified that he was preoccupied with his law practice and made very infrequent visits to the company. He received no regular reports nor, according to his evidence, did he keep an eye on the financial situation of the company. He stated that no one at NAL reported to him.

[64] On McCormack's version, while Wood was responsible for NAL's day-to-day affairs, it would seem that no one was responsible for the overall strategy and management of the company. It was McCormack's evidence that he kept the title of Chief Executive Officer

vacant as he thought he might at some point himself decide to leave the practice of law and go into business, assume control of the company and that title. He did not explain who was in control of the company in the meanwhile. The obvious inference, confirmed by other facts discussed below, is that Whyte was in control. I find that McCormack's evidence with respect to Whyte's role is unreliable and inconsistent with the evidence as a whole.

[65] While both McCormack and Wood described Whyte as a "consultant", there was considerable evidence that Whyte took a more active role in the company than could fairly be captured by that word. It is my view that the evidence clearly warrants a finding that Whyte was the person in effective control of NAL's management and direction.

[66] Marcel Gagnier, the individual Whyte hired to be president of the company in 1990, was called as witness by Lloyd's. Gagnier met Whyte through his former employer, World Wide Security. In 1990, Gagnier was looking for new employment and contacted Whyte. Whyte told Gagnier that his wife was running a company but that she had had a child and someone else was required to run it. Whyte explained the history of Armet, Cheque Express and NAI and asked Gagnier if he would accept the position of president of NAL. Whyte was the only one to discuss this with Gagnier and Gagnier negotiated his salary and a written employment contract with Whyte. Gagnier did not meet McCormack until after he was hired when, at Gagnier's suggestion, the two had a meeting. Gagnier worked closely with Wood who was responsible for day-to-day affairs of the company. It is Gagnier's evidence that he took instructions from Whyte throughout his time with NAL. Initially Whyte indicated he would show him how to run the company but, Gagnier explained, Whyte was always there and constantly involved. After Gagnier spent some time in the marketing area Whyte instructed him to pursue certain specific projects which involved researching areas of possible business for NAL. Gagnier worked with Seppo Nieminen, National's part-time accountant, on these projects and neither McCormack nor Wood were in anyway involved. In the winter of 1991, Gagnier's salary was cut in half and he was asked to focus on sales. This decision was made by Whyte and Gagnier had no discussion with anyone else at NAL and does not know if McCormack was involved in the decision. Finally, in February 1992, Whyte informed Gagnier that he was being terminated and gave him six weeks' notice. The memorandum notifying the staff was signed by McCormack but Gagnier had no discussion about his dismissal with McCormack or anyone else other than Whyte.

[67] Gagnier met McCormack once or twice during his time with NAL and saw Whyte as the person in charge of the company and as the company's owner. Gagnier observed Whyte giving instructions to other NAL employees and described a steady flow of traffic of NAL employees, including Wood, in and out of Whyte's office which was adjacent to his own.

[68] Gagnier had no involvement in financial matters. His recollection of the trust arrangement with respect to Whyte's shares was extremely vague. He was not entirely sure for whom he held the shares and thinks he held them in his name for about a week. A year after the robbery, Whyte and McCormack invited Gagnier out to dinner and Gagnier perceived the purpose of the meeting to be that Whyte and McCormack wanted to ask him if he had any documents or recollection regarding the share transfer. He told them that he did not. It was his impression that Whyte and McCormack were not entirely sure about the transaction either. About nine months after that meeting, Whyte invited him to look at a new vehicle and again asked him if he had ever found the documents. Gagnier reported that he had not.

[69] It is clear from Gagnier's evidence that he had very limited business experience and that his role at NAL fell well short of being the Chief Executive Officer of the company. He was hired and fired by Whyte and throughout his time at NAL was subject to the direct instructions and control of Whyte. I find that Gagnier's evidence strongly supports the conclusion that Whyte was in fact the person in control of the operations of NAL.

[70] Further evidence of Whyte's de facto control of the overall management of NAL was given by Rae Ackerman, the Branch Manager of the Concord office. Ackerman's evidence was that he had been given the promotion to the position of Branch Manager by Whyte and that throughout his time in that office, which lasted until after the robbery, he perceived Bill Whyte to be the owner and ultimate authority at NAL.

[71] I deal below under the heading "Ownership" with the evidence showing that Whyte remained the owner of NAL and the person in charge of its financial affairs. Taken as a whole, it is my view that the evidence establishes that Whyte had a dominant role in the management of National Armoured and that describing him as a "consultant" was clearly misleading and constituted a misrepresentation of fact. McCormack plainly was not in control. Gagnier was little more than a puppet manipulated by Whyte. Wood was the day-to-day manager but appears to have had no financial responsibility nor did he have any control with respect to the overall direction of the company. The evidence warrants a finding that while

NAL attempted to conceal Whyte's actual role in the company, in fact Whyte was the one who was running the show.

(c) Ownership

[72] I have already reviewed McCormack's evidence with respect to the ownership of the shares in NAL. In my view, Whyte remained the beneficial owner of the shares that McCormack held in trust. That conclusion would be justified even on McCormack's evidence, for he clearly does not accept that Whyte could force him to surrender his interest in Armet in exchange for Whyte's interest in NAL. There is also McCormack's evidence of the low level of investment he had made in the company. According to him, he had put in only \$2,500.00 and what he described as "sweat equity". However, according to his evidence, he devoted very little sweat to the affairs of NAL. At the same time, he suggested that Whyte was the source of funds needed by NAL, apparently supplied from a large amount of cash he kept in his office. It is difficult to imagine why Whyte would continue to pour money into NAL if he did not remain the effective owner.

[73] The conclusion that Whyte remained owner of a significant part of NAL is further fortified when one turns to the balance of the evidence with respect to the management of financial affairs. It was McCormack's evidence that he did not receive regular financial reports. He testified that responsibility for the financial affairs of the company rested with Seppo Nieminen who he described as the company's comptroller. However that evidence was contradicted by Nieminen who was called on behalf of Lloyd's. Nieminen denied that he was anything other than a part-time bookkeeper. He was a reluctant witness who was extremely vague on details and anything but forthcoming, particularly when the name "William Whyte" was mentioned. Nieminen had a connection with Whyte which went back to the early 80's when he worked for an accounting firm and was involved with a client looking to purchase Cache Courier. That deal fell through and Whyte hired him to do some work for Cache. He continued to do per diem services for NAI and then for NAL. It was Nieminen's evidence that he only oversaw the books and records as directed from time to time and that he was given direction in that regard by the management team. He was extremely vague on who he meant, but included in his list Gagnier, Whyte and Wood. As all other witnesses stated that neither Gagnier nor Wood had any significant involvement in the financial affairs of the company, that leaves only Whyte as the one to instruct Nieminen. Nieminen saw very little

of McCormack and does not recall receiving any instructions from him. He thought there might have been one meeting when they perused financial information. He testified that he did not have a regular office or desk, that he was not involved in making regular financial reports and that if these were done, they would have been prepared from the computer program by the bookkeepers Ruth Campkin or Cathy Parmentier. Nieminen denied having responsibility for supervising the work of the bookkeepers. He admitted assisting Gagnier with special projects but could not say who had assigned him to those projects. It was his evidence that the business lacked a formal structure and that everybody and anybody simply did their own thing. He denied that he had been involved in dealing with the financing of the company as McCormack had suggested and had few, if any, details to offer with respect to the financial affairs of the company.

[74] One of the bookkeepers, Ruth Campkin, was called on behalf of Lloyd's. She appeared to be a reliable and honest witness. It was her evidence that she was introduced to Whyte by Nieminen and that Whyte had been the one to hire her. It was also her evidence that she considered Whyte to be the owner of the company and that it was at Whyte's request that she prepared on a monthly basis from the computer program financial statements which she gave to Bill Whyte.

[75] I find on the basis of the foregoing that Whyte was the individual who exercised authority with respect to financial matters. This is entirely consistent with and supportive of a finding that he retained a significant ownership interest in NAL.

[76] Were these misrepresentations with respect to Whyte material? In attempting to refute that contention, counsel for the customers rely heavily on an exchange during the cross-examination of Moss. It was suggested to Moss that his concern with Whyte arose after the robbery through an investigator's report suggesting that Whyte was more involved in the company than as a consultant. Moss had difficulty recalling the details of when and how he had learned of Whyte's involvement. Counsel then turned to the submission of Wright to the underwriters, the letter of August 21, 1991:

Q. He doesn't speak ill of Mr. Whyte, does he?

A. No, he doesn't.

Q. And Bill Cole didn't speak ill of Mr. Whyte.

A. No.

Q. Charlie Allen didn't.

A. No.

Q. *So if Mr. Whyte was more involved than just as a consultant in the company, and that was presented to you, that wouldn't have under—that wouldn't have affected your decision to accept the risk, would it?*

A. *It wouldn't have been a material fact, no.*

Q. And Mr.—

A. But it—

Q. Sorry.

A. The statement that he is a consultant is a misrepresentation, and when—now, with the benefit of the information that we have, we see that Mr. Whyte was involved in, you know, the 11—10-year history of the whole of this fiasco.

Q. He could have been a consultant for ten years, though?

A. He could have been, but I think there's probably enough evidence to suggest that that is not the case.

Q. Well, His Honour will have to rule on that.

A. Exactly.

Q. Okay.

A. That is what we are here to decide. That certainly is material.

Q. What is material?

A. That fact that he is described there as a consultant and the fact that he wasn't a consultant, he was a guiding mind, and relate the fact of that—with the facts that have now come to light.

Q. All right. But—sorry. Looking at Mr. Whyte and the information you had at the time, no one spoke ill of him, correct?

A. Correct.

Q. And you're saying that well, if he was more than a consultant, then that would have been a significant fact for me, correct?

A. Yes.

...

Q. So if he had a much more active role than you initially thought when you read this document, I'm putting it to you that it wouldn't have affected your underwriting decision at that point. Here's a man—sorry, go ahead.

A. What would have affected my underwriting decision would have been the knowledge that—I'm sorry, I'm just thinking here.

Q. Shall I rephrase the question?

A. No I think I understand the question. I'm just trying to formulate the answer. If I had known that Mr. Whyte had been involved in the operation and management of the series of companies, the predecessor companies, if you like, of National Armoured and—National Armoured Ltd. and National Armoured Inc. which was, as we know, not a predecessor but Ltd. bought the assets of Inc. out of bankruptcy, as I understand it—had I been aware that, if you like, there was this trail of bankrupt companies going back nine years in which Mr. Whyte had been involved and appeared to have been involved in the management thereof, then that would be very material, yes.

[77] Counsel urge me to find on the basis of the italicized portion of this exchange that the question of the extent of Whyte's involvement was not a material fact. I reject that contention as unwarranted. It appeared to me that Moss was somewhat confused at the time he gave the evidence in the italicized portion. Those passages must be read in light of the surrounding extracts and in light all of the evidence. Moss clearly stated that the question of moral risk was paramount in armoured carrier insurance and that the identity of those behind the company was material. He stated in chief that had he known the truth about Whyte's involvement, he would not have gone near the risk "with a barge pole". This is hardly surprising given the prominence given to the level of Whyte's involvement and the detailed review of the concerns of Ippolito in Wright's submission of August 21, 1991. The materiality of the extent of Whyte's involvement is further supported by the evidence of John Lewington, called by the customers as an expert on underwriting. He testified that Wright's letter of August 21, 1991 raised a red flag concerning Whyte and he clearly saw the question of Whyte's involvement as material.

Moreover, the question of Whyte's role is closely bound up with the issue of ownership and the company's history. Wood admitted that he learned from Cole that the prior insurer was concerned about the "companies bumping into one another". In my view, the evidence amply supports a finding that from an underwriter's perspective, the integrity of Whyte was suspect and that the extent of his involvement in the business of NAL was a material fact.

(d) Role of Wright and Kelly Associates

[78] The customers contend that Wright and Kelly Associates were acting as agent for Lloyd's and that the representations contained in Wright's submission to the London broker must be read in that light. In my view, little if anything turns on this. Even if Wright was acting as Lloyd's agent, the misrepresentations I have just found do not lose their sting. If in law, Wood and McCormack were speaking directly to Lloyd's when they spoke to Wright, I fail to see how in the circumstances of this case it could make any difference in the result. There were still material misstatements of fact.

[79] However, I do find that Wright was acting as agent for NAL at the time the insurance was arranged in September 1991 and renewed in September 1992. It is clearly established by the evidence that Wright could not approach the Lloyd's underwriter directly. The established practice of Lloyd's requires the intermediary of a London Lloyd's broker. It is difficult to see how Wright could be Lloyd's agent in view of this practice. There is an established line of authority to the effect that a broker in Wright's position is the agent of the insured and not the agent of the underwriter: *Anglo-African Merchants Ltd. v. Bayley*, [1969] 2 All E.R. 421 (Q.B.) at 424, 428; *Rozanes v. Bowen* (1928), 32 Lloyd's Rep. 98 at 101; *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138 (1980) at 144-146; reversed in part 669 F.2d 1259; *MacGillivray & Parkington on Insurance Law*, 8th ed., para. 1375. In my view, there is nothing in the facts before me to distinguish those cases. The role played by Wright in obtaining information from National and submitting it to the underwriter was the typical work of an agent arranging insurance on behalf of a client. It may well be that after the robbery, certain actions

[80] taken by Wright (especially advice on termination) were done on behalf of the underwriter, but in my view that does not justify a finding that would be contrary to the established practice of Lloyd's and to the authorities to which I have referred with respect to the placement of the insurance.

(e) Terms of the Policies

[81] The customers submit that if Lloyd's sought to reserve the right to invalidate coverage as a result of some misrepresentation or omission, it was incumbent upon Lloyd's to make this known in clear, express and easily intelligible terms. It is further submitted that as there was nothing in the policies to this effect, and as Lloyd's based its decision on Wright's letter rather than a printed application form containing a statement to this effect and signed by NAL, Lloyd's has no right to void the policies on grounds of misrepresentation. In my view, this argument is lacking in substance. The obligation to be candid and honest when applying for insurance has been a feature of insurance law for over 200 years: *Carter v Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162 (K.B.). This is not an arcane or technical rule: it requires no more of an insured than complete honesty. It should come as no surprise to either NAL or the customers that if facts material to the risk are misrepresented, insurance coverage will be affected. An insurer is under no obligation to warn an insured, much less a third party, that its policies are subject to the general law of insurance and may be voided for misrepresentation: *Bode v. Chubb Insurance Co. of Canada* (1991), 3 O.R. (3d) 752 at 770, 772, 82 D.L.R. (4th) 362 *sub nom. Law Society of Upper Canada v. Chubb Insurance Co. of Canada* (Ont. Ct. (Gen. Div.)).

(f) Misrepresentations of Fact at the Time National Obtained Insurance from Lloyd's: Conclusion

[82] To determine if information is material, the court must ask whether, on a fair consideration of the evidence, the information would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium: *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.*, [1925] A.C. 344, [1925] 1 D.L.R. 583 (J.C.P.C.); *Vrbancic v. London Life Insurance Co.* (1995), 25 O.R. (3d) 710, 127 D.L.R. (4th) 656 (Ont. C.A.).

[83] I find that the facts with respect to NAL's establishment and claims history, ownership of the company and the role and position of Whyte were material facts. The materiality of these facts was established by the evidence of Wright and Moss and confirmed by Lewington. I reject the argument advanced by the customers that if the underwriter was concerned about claims history, ownership and management, he should have asked more questions. I deal below with the issue of the respective duties of insurer and insured at the point the insurance contract is formed. I conclude there that it is well established in law that the duty of the party

applying for insurance is one of utmost good faith. It is incumbent upon that party to be honest and there is no duty at law imposed upon the insurer to ferret out the truth.

[84] I therefore find that at the time it obtained insurance from Lloyd's in September 1991, NAL made material misrepresentation of fact with respect to its establishment and claims history with respect to the ownership of the company and with respect to the role and position of Whyte. Those misrepresentations were made again when NAL renewed its policies in September, 1992. These material misrepresentations entitle Lloyd's to void the policies for the period commencing September, 1992 *ab initio*.

[85] Lloyd's did inform NAL that it was voiding the policies and the premiums for the period from September, 1992 were refunded. It was suggested during argument that Lloyd's had lost the right to void the policies on the ground that it was required to void the earlier policies from September, 1991 to September, 1992 and return the premiums for that period as the same misrepresentations were operative during that period. In my view, this argument is without substance. I can see no reason why the insurer should forfeit its rights on the ground that it could have taken more drastic action. Moreover, it has been held that where an insurer voids the policy on grounds of fraudulent misrepresentation, it is not obliged to refund the premium: see *Moscarelli v. Aetna Life Insurance Co. of Canada* (1995), 24 O.R. (3d) 383 (Ont. Ct. (Gen. Div.)); appeal quashed [1995] O.J. 3997 (QL) [reported 87 O.A.C. 314 (Ont. Div. Ct.)].

Issue 2. Did NAL fail to disclose facts material to its insurance

(a) with respect to alleged "cash lapping"

and if so, did such non-disclosure justify Lloyd's in voiding the policies *ab initio*?

[86] Shortly after the robbery, certain individuals were arrested and charged. One of those was John Fullerton, Director of Security at National Armoured Ltd. Fullerton made a detailed statement to the police regarding the robbery and certain other improper behaviour at the company prior to the robbery. While I admitted Fullerton's statement in evidence on the authority of *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.), the admission of this evidence was strongly resisted by counsel for the customers. Fullerton's statement strongly supports my findings with respect to cash lapping. However, because the admission of his statement raised issues in a relatively uncharted area of the law, I intend first of all to analyze the evidence on these matters independent of his statement.

[87] The allegations here concern serious misconduct of a criminal nature. The burden of proof clearly rests with Lloyd's. The authorities establish that while the burden remains the ordinary civil balance of probabilities standard, "the degree of probability" must be "commensurate with the gravity of the offence": *Bernardi v. Guardian Royal Exchange Assurance Co.*, [1979] I.L.R. ¶1-1143 (Ont. C.A.) at 387; *Hanes v. The Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, 36 D.L.R. (2d) 718 (S.C.C.).

[88] Following the robbery Moss instructed Wright to retain the services of Frances Mullen an insurance investigator. As a result of Mullen's investigations, a forensic accountant, Linquist Avey and Baskerville was retained. James Baskerville gave evidence on behalf of Lloyd's as an expert in forensic accounting with respect to the investigations. He and members of his staff made investigations which concerned two areas, namely that prior to the robbery, NAL was engaged in the practices of "cash lapping" and "cheque kiting."

(a) Cash Lapping

[89] It is alleged that for some considerable period prior to the robbery, first in 1991, then again in the summer of 1992 and then from the fall of 1992 up to the time of the robbery, NAL had engaged in what was described as "cash lapping". The allegation was that during these periods, personnel from NAL were removing cash from customer bags, using that cash for company operations, and then replacing the cash with cash taken the next day from customer bags.

[90] Baskerville's evidence was based upon a review of the documents and from certain interviews conducted with NAL staff. His investigations revealed a significant number of unexplained cash deposits to the NAL bank account. He acknowledged that the investigation was hampered by the fact that the documents were incomplete and on cross-examination, he admitted that he could not directly trace funds allegedly obtained from cash lapping to the bank account of NAL.

[91] However, Lloyd's cash lapping allegation does not rest on a forensic accounting theory alone. There is a considerable body of evidence to support a finding that NAL was engaged in this illicit practice. An understanding of the evidence requires consideration of the procedures of National Armoured and the documents used. Evidence of this was given not only by Baskerville but also by Tom Fines, an experienced National Armoured messenger, Rae

Ackerman, National Armoured's Branch Manager, as well as Wood and Fullerton. It was Ackerman's responsibility as Branch Manager and custodian of the vault to prepare on a daily basis delivery sheets for each of the eleven routes. These sheets indicated the customer from whom the bag had been obtained, and the place to which that bag was to be delivered. These sheets were part of a continuing cycle. "Vault Holdover Sheets" were completed during the day by the messenger to indicate parcels that had been collected and the destination of those parcels. About 70% of the parcels were delivered on a same-day basis while the remaining parcels were returned to the vault. At each stage of the process, the individual employee responsible for custody of the package was required to sign or initial the sheets indicating responsibility for its custody and control. In the ordinary course, the signature or initial on the vault holdover sheet would be that of the vault custodian indicating that the bag which had been collected from the customer had been taken into custody at the vault at the end of the day to be delivered to the appropriate place the next day.

[92] On a significant number of vault holdover sheets, John Fullerton initialled opposite packages from two customers involved in high-volume cash wholesale business, Lanzarrotta Wholesale Grocers and Davis (Federal Cash and Carry). On one occasion, namely, November 17, 1992 Alan Wood signed for a package from Lanzarrotta. There are also a significant number of special delivery sheets for Lanzarrotta and Davis bags in Fullerton's writing and identified by him which are inconsistent with the bags having gone into the vault to be delivered in the ordinary course.

[93] Fines gave evidence as to the circumstances in which Fullerton and Wood initialled these vault holdover sheets. Fines testified that while it was, as a general rule, uncommon to be called by the office regarding special deliveries or pickups, he had been frequently called with respect to the Lanzarrotta bags. It was his evidence that in almost all cases, these special pickups were conducted by Fullerton and in almost every case, the pickup was accomplished at the same location. From July to September 1992, this occurred once or twice a week; during September it occurred more frequently until it became a daily occurrence up to the date of the robbery. Following the robbery, although the company continued in business for a time, this practice did not recur. It was Fines' evidence that the other individuals involved in these pickups were Frank Ragni, who did the pickup once or twice, and Alan Wood who did the pickup once. Fines testified that various vehicles were used by those doing these pickups. The truck would be asked to wait at the designated location as requested by the office. The

individual doing the pickup would knock on the door and accept the parcel and initial the vault holdover sheet. Fines identified Frank Ragni as often being involved with Fullerton's pickups as the driver of the other vehicle. Fines was suspicious of this practice. When he asked John Fullerton the reason, Fines was told that the customer had requested same-day delivery. He also asked Rae Ackerman about the practice who told him to ask John Fullerton.

[94] Ackerman provided further evidence regarding these pickups. He testified that on a regular basis John Fullerton instructed him to call trucks on particular runs to inform them that Fullerton wished to meet them. Ackerman testified that this occurred once or twice in the summer of 1991, then again about twice a week in July 1992 following the NAL payroll day when it would continue for several days. In September and October 1992 the practice became more current until by the later part of October it was happening every day. According to Ackerman, only two customers were involved, namely, Lanzarotta and Davis. Ackerman testified that when Fullerton returned to the NAL office, he took these bags into his own office rather than to the vault. It was Ackerman's evidence that he could see Fullerton doing this on the closed circuit camera security system as he was the one who would have to push the button to allow Fullerton access to the office. While counsel for the customers attacked Ackerman's credibility on the ground that he had given a different version of these events to the insurance investigators and the police, on the basis of an affidavit sworn in March 1993 but now repudiated, and in light of a dispute and altercation regarding his wages and company property after the robbery, I found him to be a credible witness. I accept his explanation that he was simply afraid to tell the truth to the police and the insurance investigators immediately following the robbery. I accept his evidence that he felt pressured at the time and that he has now come forward to tell the truth. I base this finding of credibility primarily on the fact that his testimony at trial is largely consistent with the evidence offered by the documents and by other evidence, referred to below, which I find to be credible.

[95] At trial, John Fullerton identified his signatures or initials on a long list of "vault holdover sheets". These initials or signatures indicated, he admitted, that he had removed customer bags from trucks while they were on the road. At trial, Fullerton denied, however, that he took the bags to his office or that he removed cash from the bags. When asked for an explanation as to why he would conduct these special pickups, he stated that he was conducting security audits. He testified that it was his practice to conduct audits of the manner in which the drivers and messengers on NAL trucks behaved.

[96] Further evidence of these special pickups was given by Wood. He admitted that he was aware during the summer and fall prior to the robbery that Fullerton and others frequently met vehicles to take bags off the vehicles. He testified that his understanding of the reason for these special pickups was to perform security audits. He also identified his own initials on a vault holdover sheet for November 17, 1992 indicating that he had received a bag from Lanzarotta. At trial, he testified that he could not recall going out to pick up the bag from Fines, although he stated that this was possible. It was Fines' evidence that he distinctly recalled Wood collecting the bag on that occasion. Wood's explanation for his initials on the November 17 sheet has been inconsistent. On discovery, when he was a party to the action, Wood gave a detailed account of how he had been assisting Ackerman at the vault on November 17, signed for one package and then been called away to the phone. This version is directly contrary to that of Fines, who struck me as an entirely reliable and credible witness. Moreover, Wood also testified on discovery that one reason for doing these special pickups was to relieve trucks of loads which were in excess of insurance limits. At trial he admitted that this rarely if ever happened, while on discovery he had stated that it occurred on a fairly regular basis.

[97] I find that the explanation offered by Fullerton and Wood at trial, namely, that these special pickups were conducted as security audits, is not believable. It is inconceivable that *bona fide* security audits would be performed in this manner. In particular, no explanation was offered as to why security audits would be required on precisely the same route and involving precisely the same customer bag on a daily basis for an extended period up to the time of the robbery. The prior inconsistent explanations offered by Wood is damning of his evidence at trial. I find that Wood has offered whatever explanation he thought would be accepted without regard for the truth in this area. I also reject Fullerton's evidence on this point which, as will be seen, is inconsistent with the statement he gave to the police at the time of his arrest following the robbery (a matter I would be entitled to take into account even if the statement had not been admitted for proof of its truth).

[98] Another aspect of Wood's evidence should also be noted here. On discovery and at trial, he testified that one explanation for the unexplained cash deposits used by NAL to finance its operation was an arrangement with the owner of a Swiss Chalet Restaurant, a man named Malaysian. Special deliveries, according to Wood usually done by John Fullerton, were arranged whereby the restaurant would give NAL cash in exchange for a cheque from

NAL. Wood said that it was understood by Mr. Malaysian that NAL would use the cash in its operations. I find this evidence to be totally incredible on a number of fronts. First of all it is, on its face, highly implausible that any business would enter such an arrangement. Secondly, no documents such as cancelled cheques from NAL or any other independent evidence was offered to support this practice. Third, Wood admitted that he had never mentioned it to the investigators following the robbery although he was fully aware of the cash lapping allegation and of the need for NAL to supply some explanation for otherwise unexplained and unrecorded cash deposits into its bank account. Wood's explanation for this was that he had simply forgotten about the practice and only remembered it when he was examined for discovery. It is clear that at the time of the investigation, Wood knew that the company's insurance was on the line and that if no explanation were offered for otherwise unexplained cash deposits, the insurance would be terminated. This, in turn, would be fatal to the company's continued operation. In these circumstances, it is difficult to conceive how the company's president could simply forget a matter so vital to the company's future. I find that the Malaysian story was a fabrication and that it provides further ground for rejecting Wood's evidence on this aspect of the case as being entirely unreliable.

[99] While I find that the foregoing is sufficient to justify a finding that NAL engaged in cash lapping as alleged by Lloyd's, Fullerton's confession to the police confirms that fact. In his confession, Fullerton stated that he was involved in removing cash from the bags of customers to satisfy the financial need of the company. He stated that Wood and Ragni were both involved in the practice. While Fullerton denied the truth of his confession at trial, I cannot accept his repudiation as truthful. I have already indicated that I reject his explanation for the intercepts that he admitted to. His repudiation of the confession was wholly unconvincing. While he undoubtedly has serious health problems, I do not accept his evidence that he has suffered a total memory lapse regarding events at around the time of the robbery due to drugs he was taking at the time. I find it impossible to reconcile his assertion that he forgets everything with the claim that he knows what he told the police was untrue.

(b) Cheque Kiting

[100] A second area of inquiry uncovered during the Linquist Avey forensic examination is the allegation that in the period June 1 to early August 1992, NAL was engaged in a cheque kiting scheme whereby its bank balance was artificially inflated. The documents giving rise to

this allegation are cancelled cheques, deposit books and bank records indicating that on a regular basis during this dated period there were cycles of cheques involving NAL, 2640-8377 Quebec Inc. (NAL's Montreal operation), and another company Stockhouse International. The forensic investigation was based on a review of the records of NAL and the numbered Quebec company. The investigators did not have access to the Stockhouse records. These transactions frequently involved several cheques on a single day in odd amounts which added up to a round number. These transactions were not recorded in the accounting records of NAL and no one at NAL was able to offer Linquist Avey any explanation as to what the transactions were for or as to why they had not been recorded.

[101] Baskerville indicated that the biggest gap in the documents was the lack of information from Stockhouse as to its role in the cheque transactions. It appears that Stockhouse is a company owned by Frank Ragni. No witness was able to point to any business connection apart from these transactions between Stockhouse and National Armoured Ltd. Wood testified that it was his understanding that Stockhouse was an importer of men's suits and that Ragni had once offered him a suit. Wood knew of no business connection between Stockhouse and National Armoured.

[102] Ruth Campkin testified that she recalled receiving calls from the bank regarding money required to cover NAL's overdraft. She would be given a figure and a time by which the money had to be deposited. When she received these requests, it was her practice to let Wood and Ragni know of the need and she testified Ragni usually took care of the matter. She would prepare cheques on the instructions of Ragni. She was able to identify a number of such cheques she had prepared including at least one cheque that she wrote from the numbered company to Stockhouse and that Ragni had endorsed so as to make it part of the NAL deposit. It was her evidence that Whyte, Wood and the other bookkeeper, Cathy Parmentier knew of the practice.

[103] Wood admitted to having initialled changes on four of the cheques payable to Stockhouse. It was his evidence that he did not know the purpose of these cheques, although they were for a significant sum. He had signing authority and a signature stamp was often used for the questionable cheques. He stated that he did not supervise the use of the signature stamp and assumed that Nieminen had established procedures in this regard although he could recall no discussion of the use of the signature stamp. Wood stated he

would sign cheques for two reasons, either to pay casual weekend employees or to replenish petty cash. These would be for small amounts. He admitted that the cheques from NAL to the Quebec numbered company for over \$1 million payable to the numbered company's payroll account were well in excess of what would be required to meet that company's payroll. He could offer no explanation of why the payments represented by the cheques from NAL to the numbered company alleged to be part of the cheque kiting scheme would have been made, although he stated that he thought it might be for repayment of loans. He stated that he was not shown any documentation regarding loans. He stated that he did not know who had authorized Campkin or Parmentier to borrow money in this fashion to meet the company's needs and further testified that he had never discussed these loans with McCormack.

[104] McCormack testified that the first time he had ever heard of Stockhouse was when he read the Linquist Avey report.

[105] Baskerville was unable to give a firmer opinion than that the documents were consistent with a cheque-kiting scheme. On cross-examination, he admitted that there were certain aspects of these transactions one might not expect to find in a cheque-kiting scheme. The most significant was the fact that the cheques from NAL to the numbered Quebec company were certified. This is inconsistent with an attempt to achieve the maximum possible delay which is inherent in any cheque-kiting scheme. It is also the case that no claim appears to have been made from any financial institution and that in the end, there appears to have been sufficient funds to cover the cheques. It is submitted by the customers that there is no proof of fraudulent intent and that NAL was doing no more than benefiting from the usual delay in having the cheques cleared.

[106] In my view, the evidence amply supports a finding that National Armoured did engage in cheque kiting. On their face, these transactions are highly suspect. First, it is difficult to imagine why there would be this cycle of cheques involving a company which had no business relationship with NAL. Second, the frequency of these transactions is difficult to understand on any other basis. In my view, the pattern and frequency takes the practice engaged in by NAL out of the realm of innocently benefiting from delays in the banking system. Campkin's evidence links the cycle of cheques to NAL's need to cover its overdraft. In my view, it can be readily inferred that NAL was engaged in a deliberate scheme of artificial transactions carried out with fraudulent intent to obtain a significant advantage in covering its

overdraft. Finally, the fact that no one from NAL was able to offer any explanation for these transactions is telling. Wood, McCormack and others at NAL knew, at the latest from February, 1993 when Linquist Avey's report was released, that without an explanation, NAL's insurance coverage was at risk. They knew as well that without insurance, the company could not carry on business. In these circumstances, it is a fair inference that if an innocent explanation for these transactions existed, it would have been offered.

[107] I find on the basis of the evidence that has been adduced, moreover, that the cheque-kiting scheme was known to the President of the company, Wood. Wood admitted initialling certain of the Stockhouse cheques and he was identified by Campkin as one of the individuals involved in the transactions.

[108] It should be noted that there are other aspects of NAL's response to the Linquist Avey investigation which are highly suspect. Even before Linquist Avey was involved, Mullen told Wood about Fullerton's allegations of cash lapping shortly after the robbery in December. Wood testified that Mullen asked him not to make notes of the conversation and to keep the discussion confidential. Despite this, when the Linquist Avey investigation was being established, Wood wrote a letter stating that he had never been given specific details of the allegations. This letter, he stated, was drafted with McCormack's assistance but it is clear that Wood knew precisely what the allegations were.

[109] Following the Linquist Avey report, Nieminen testified that he was asked to prepare a response. Nieminen engaged the services of a bookkeeper to assist in collecting the information, but shortly after he commenced his work, he was instructed by Whyte that he was not to bother with it any further. Nieminen also categorically denied the statement made by McCormack in his evidence that Nieminen had undertaken to take custody and control of the financial records of NAL at McCormack's. Nieminen stated that he would never have agreed to assume this responsibility.

[110] Wood was extremely vague as to why NAL had not responded to the Linquist Avey allegations. He testified that it was his understanding that Nieminen had been asked to prepare a response, but he could not recall if he had ever followed up with Nieminen to see if a response had been given. At trial he stated that he had discussed with Whyte loans allegedly made by Whyte which would provide some explanation for the otherwise explained cash deposits. He could not, however, recall what he had asked Whyte and stated that he

had asked Whyte simply because he was curious. This was in direct conflict with his testimony on discovery where he stated categorically that he had never discussed the question with Whyte.

(c) Cash Lapping and Cheque Kiting—Conclusion

[111] I find that cash lapping and cheque kiting were material facts that were not disclosed to the insurer. Wood admitted in his evidence that if the company were engaged in either cash lapping or cheque kiting its insurance would be affected. I find that at the time the NAL policies were renewed in September 1992, Wood, the person responsible for NAL's insurance, had actual knowledge of both the cheque kiting and cash lapping activities at NAL. Indeed, I find that he was an active participant in both schemes. It is clear that these activities were not disclosed to Lloyd's and I find that this failure to disclose material facts affecting the risk assumed by Lloyd's is sufficient to justify Lloyd's in voiding the policies *ab initio*.

Issue 3. Did Lloyd's fail to exercise due diligence in underwriting the risk and does such failure deprive Lloyd's of the right to rely on the above grounds to void the policies?

[112] The customers contend that Lloyd's should be disentitled from relying on any misrepresentations and no-disclosures on the ground that Lloyd's failed to exercise due diligence in underwriting the risk. In my view, this argument must be rejected.

[113] It is a well established principle of insurance law that an insured has a heavy burden to make full and complete disclosure of all relevant information when applying for insurance. It was recently described by Cory J. as follows (*Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622 at 636, 85 D.L.R. (4th) 609 (S.C.C.)):

The *ubberima fides* doctrine is a longstanding tenet of insurance law which holds parties to an insurance contract to a standard of utmost good faith in their dealing. It places a heavy burden on those seeking insurance coverage to make full and complete disclosure of all relevant information when applying for a policy.

[114] The rationale for this rule is the disparity in access to information. The insured has superior knowledge of the relevant facts and the law imposes upon that party the duty to be open and honest. As already noted, this rule has been a feature of insurance law for over 200 years.

[115] The customers contend, however, that the basic rule has now been qualified by the *Taku Air* case, *supra*. The case involved a claim by passengers of a commercial air carrier. The carrier was required by regulation to have liability insurance. When applying for the insurance, the carrier failed to disclose fully past losses and the insurer denied coverage. However, the same insurer had provided coverage for the earlier period when the undisclosed losses occurred and if the insured had reviewed its own files, it would have uncovered the full claims history. On those facts, the Supreme Court of Canada held that, the insurer was not entitled to void the policy on that ground. Writing for the majority, Cory J. stated as follows (at 637-640):

The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waives being informed of.

When Lord Mansfield set the principle governing insurance contracts the world was a little different. It was a simpler if not, in some respects, a gentler place. The business of insurance was very different. Then policies of insurance were issued most frequently to cover a vessel, or its cargo. The contract was issued for the benefit of the insured. It was the owner as insured who would have the detailed knowledge of the vessel or its cargo. No one would know better than the owner of the incipient dry rot or the tendency of the ship to take on water in a fresh breeze. This was knowledge that the insurance company could not readily attain and it was appropriate to relieve the insurer of all responsibility for obtaining it. That principle held true in 1766. It can hold true today where the policy is for the exclusive benefit of the insured.

However, I do not think it should be applicable to the situation presented in this case. Here the insurer was entering into a field known to be highly regulated. The Regulations provided that before a commercial air carrier could obtain its licence it was required to obtain and file proof of insurance coverage for its passengers to the extent of \$300,000 per passenger.

Thus the Regulations require a carrier to have insurance which will benefit members of the public flying as passengers. These members of the public who are beneficiaries of the insurance are excluded from the negotiations leading to the placement of the policy. It is they who are at risk. It is they who are purportedly the beneficiaries of the policy yet it is they whose claims can be so easily frustrated.

The Regulations provide that insurance for the passengers is mandatory. They represent public policy. The insurance is primarily for the benefit of the flying public and not for the air carrier. If it can be so readily frustrated by the automatic application of principles enunciated by a court two hundred years ago in a different time and circumstances then the law seems grossly unfair. It was the court not the legislature which expounded the principles applicable to the placement of insurance policies in 1766. It does not seem inappropriate for a court to set out the principles applicable in today's society.

...

Surely the imposition of these modest requirements on the insurer is not placing too great a burden on an insurer entering the field of aviation insurance in which the passengers will be the beneficiaries. In this case the insurers had within their own grasp information which would have provided a more accurate assessment of the risk entailed by the policy. At a minimum, the insurers should have scrutinized their own records before issuing the policy. They did not meet the standards required of an insurer operating in this field. Having failed in exercising the required standard of diligence, the insurers cannot escape liability to the passengers on the policy because the insured also failed in its duty.

[116] It is significant to note, however, that the passengers failed in their claims on the ground that insurer was entitled to void the policy on the basis of another misrepresentation, namely the number of seats on the aircraft in question (at 643):

The load capacity of a particular airplane and the number of passengers to be carried is highly relevant information that is of critical importance to the insurer. It is essential information the insurer must have in order to assess the risk and set the premium. It is the owner that sets out the number of passengers to be covered. By requiring the insured to carry only the specific number of passengers declared in advance, the insurer is merely requesting the insured to operate the aircraft in compliance with the carrier's own specified requirements.

Only Taku would know of seating changes it might be making. It requested coverage for only four passenger seats. The insurer was entitled to rely on the representation of Taku. The insurer need not continuously monitor the number of passenger seats the

insured provides in an aircraft as a result of changes made in the seating configuration. It is not a violation of the common law duty outlined above for an insurer to limit liability to coverage for the number of seats specifically requested by the carrier in applying for insurance.

[117] In my view, the exception to the ordinary utmost good faith rule articulated in *Taku* is inapplicable to the present case for a number of reasons.

[118] First, this is not a highly regulated area where the legislature has mandated specific insurance requirements for the protection of vulnerable consumers. The only insurance mandated by regulation applicable to NAL was that applicable to truck transportation undertakings generally. This is quite unlike the detailed regulatory scheme applicable to the airline carrier in *Taku*. The customers of NAL are plainly in a very different situation than airline passengers. The customers are sophisticated commercial parties fully able to look after their own interests.

[119] Second, the crucial point in *Taku* was that the insurer had ready access to the information. It was contained within its own files. Here, the information was within the control of NAL. As Cory J. noted, *Taku* only slightly varied the established rule. The Supreme Court plainly did not intend to reverse entirely a basic and long-standing principle of insurance law. To hold here that Lloyd's was not entitled to take Wood, McCormack and NAL at their word but rather required to investigate the facts for itself would represent a fundamental departure from the established legal rules relating to the formation of contracts of insurance. This would, in my view, be entirely unwarranted on the authority of *Taku*.

[120] Third, it is my view that the Supreme Court's holding in *Taku* that the insurer was entitled to void the policy on account of the misrepresentation of the number of seats is what should govern here. Indeed, it seems to me that it would have been easier for the insurer to determine for itself the seat configuration *in Taku* than it would have been for Lloyd's to determine the matters that were misrepresented or not disclosed here.

[121] Accordingly, I find that there is no basis in law to support the contention that Lloyd's is precluded from voiding the policies for lack of due diligence. In my view, Moss was entitled to proceed on the basis that the information he had been given was accurate, and he was under no duty to further investigate the facts.

Issue 4. Did NAL fail to cooperate in the post-robbery investigation and does such failure justify Lloyd's in voiding the policies?

[122] It is submitted by Lloyd's that NAL failed to cooperate in the post-robbery investigation. It is clear that there were certain delays at the commencement of the investigation. However, on the basis of the correspondence and the evidence of Baskerville, Wood and McCormack, it is my view that the actions of NAL fall well short of what would be required to justify a finding in Lloyd's favour on this point. There were serious allegations, including the threat of criminal charges, and in those circumstances, it is my view that the steps NAL took to clarify the purpose and terms of the investigation were understandable. Accordingly, had it been necessary, I would not have been prepared to make a finding in favour of Lloyd's on this ground.

Issue 5. Did NAL submit a fraudulent claim following the robbery so as to justify Lloyd's in voiding the policies ab initio?

[123] The basis for this contention is Rae Ackerman's evidence that following the robbery, at Whyte's request, he signed vault holdover sheets for bags which Ackerman knew had not been in the vault at the time of the robbery.

[124] It was Ackerman's evidence that Fullerton had given him these vault holdover sheets after the robbery. These were for bags that Fullerton had intercepted and taken to his office. Ackerman simply filed the documents. Whyte became openly involved in the post-robbery investigation and claims adjustment process. Whyte came to Ackerman about what he described as a breakdown in procedures and insisted that Ackerman initial the sheets some two weeks following the robbery. Ackerman did so, although, as he explained at trial, not in precisely the same way he would if the bags had come into the vault in the usual way. Subsequently, on March 1, 1993, Ackerman swore an affidavit verifying these documents. It will be recalled that in his confession, Fullerton stated that at the time of the robbery, over \$200,000 had been removed from customer bags.

[125] Proof of claim forms were submitted to Lloyd's for amounts which include the contents of the bags Ackerman signed for after the fact. It is well established that filing a document which fraudulently states a claim permits the insurer to deny the claim and avoid the policy altogether: see e.g. *Royal Insurance Canada v. Dimario* (1987), 29 C.C.L.I. 67 (Ont. Div. Ct.).

However, I am not satisfied that the evidence justifies a finding in Lloyd's favour on this point. The evidence on this issue was not fully developed. No details were given as to the submission of the proofs of claim nor as to precisely who was involved. Without that evidence it would, in my view be inappropriate to make a finding in Lloyd's favour on this point.

[126] Issue 6. Did NAL itself stage or participate in the alleged robbery so as to justify Lloyd's in voiding the policies or deny any claims?

[127] The circumstances give rise to grave suspicion that NAL itself staged or participated in the robbery. However, this is a very serious allegation and in my view, the evidence is insufficient to warrant a finding to that effect.

[128] The only evidence of the robbery itself is the statement of Fullerton to the police at the time of his arrest. That statement clearly implicates Fullerton and Ragni as principal perpetrators of the robbery. There is nothing in Fullerton's statement to show that Wood or McCormack were involved and there is no admissible evidence to establish Whyte's involvement. There is no evidence as to what has become of the proceeds of the robbery.

[129] The Lloyd's policies cover NAL's liability for loss "arising from any act or omission of the Assured or any of its employees". The policies would cover NAL's liability to its customers if the loss occurred as a result of the criminal act of Fullerton. For Lloyd's to succeed on this point, it must prove that the criminal act was the act of NAL itself.

[130] Has Lloyd's shown that the act of Fullerton was the act of NAL? The Supreme Court of Canada has held that to attribute the criminal act of an officer to the corporation it must be shown that the act was that of one of the corporation's directing minds (a) within the field of operation assigned to that person; (b) not totally in fraud of the corporation; and (c) by design or result partly for the benefit of the corporation: *R. v. Canadian Dredge & Dock Co.*, [1985] 1 S.C.R. 662 at 713-714, 19 D.L.R. (4th) 314 (S.C.C.). Lloyd's relies on the fact that Fullerton said that on the eve of the robbery, over \$200,000 had been taken from customer's bags and not repaid.

[131] As Director of Security, Fullerton was one of the corporation's directing minds and his role in participating in the robbery was possible because of the field of operation assigned to him by the company. The effect of the robbery was to provide the company with a cover for the cash lapping in that, as just noted, Whyte was implicated in having Ackerman initial

documents resulting in a claim being submitted on behalf of a customer for funds that had not found their way into the vault. However, there is no admissible evidence linking Whyte to the robbery, no evidence that Fullerton was not party to the submission of the false claim and no evidence as to what became of the proceeds of the robbery. In my view, in the absence of proof linking a directing mind of NAL to both the robbery and the provision of an actual benefit to NAL, the evidence is insufficient to establish on a balance of probabilities commensurate with the gravity of the allegation that the robbery was by design or result partly for the benefit of the corporation. Accordingly, had it been necessary to decide the case on this point, I would have dismissed the contention of Lloyd's.

Issue 7. To the extent that any of the above grounds are established by Lloyd's, do they affect the rights of the customers

(a) pursuant to s. 132 of the Insurance Act

(b) as "loss payees" under the policies?

(a) Insurance Act s. 132

[132] Section 132 of the *Insurance Act*, R.S.O. 1990, c. I.8, provides as follows:

132(1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's, liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

[133] The customers have obtained default judgments against NAL which have not been satisfied. However, as is clear from s. 132 itself and from the case law, the rights the customers have under this provision are subject to the defences Lloyd's would have if the claim were being advanced by NAL: *Coronation Insurance Co. v. Taku Air Transport Ltd.*, *supra*; *Oger v. Chiefscope Inc.* (1996), 29 O.R. 215 (Ont. Ct. (Gen. Div.)) at 218. It follows that as I have found that Lloyd's was entitled to void the policies on the basis of misrepresentation and non-disclosure, the customers have no rights pursuant to this provision.

(b) Loss Payees

[134] The policies provide as follows:

3. Loss, if any, payable to the assured and/or its customers as their respective interest may appear. In the case of loss Underwriters shall not be liable for any greater sum than the market value of property lost or damaged on the date of loss, but in no event beyond the liability of the Assured or the amount declared for insurance hereunder not exceeding the limits specified herein.

[135] This clause permits the insurer directly to pay the party who has suffered a loss for which the insured is liable. In my view, it is well established in law that a loss payee provision of this kind will at best support a derivative claim by the customers against Lloyd's which is subject to all of the defences available to Lloyd's against NAL: see *Agricultural Savings and Loan Co. v. Liverpool and London Globe Insurance Co.* (1901), 3 O.L.R. 127 (Ont. C.A.) at 142 (reversed on other grounds 33 S.C.R. 94); *Coleman v. Northern Assurance Co.*, [1950] 3 D.L.R. 556 (Ont. H.C.J.) at 561.

[136] The circumstances here plainly do not fall within the exception to this rule made by the standard form mortgage clause which explicitly confers direct rights upon the mortgagee that are unaffected by defences available to the insurer against the insured: see *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, 74 D.L.R. (4th) 197 (S.C.C.), considering the following provision [at p. 1035]:

"This insurance and every documented renewal thereof—AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN—is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk."

[137] The language of the "loss payee" clause in the case at bar stands in stark contrast. It does not protect the rights of the third party in the event of misrepresentation by the insured. Accordingly, I find that the status of the customers as "loss payees" renders them subject to the defences available to Lloyd's as against NAL.

Issue 8. Do the customers have any rights against Lloyd's independent of NAL as "unnamed assureds" or otherwise that are not affected by the above grounds!

[138] It is submitted by the customers that the NAL policies should be read as conferring upon them the status of an insured party with rights against the insurer not affected by defences it would have to claims asserted by NAL.

[139] The case law stipulates that for a person to be considered an unnamed insured, it is necessary to show: (a) that they are part of a class of persons clearly described in the insurance policy; and (b) that the policy shows a clear intention by both the insurer and the named insured to include members of that class as insureds: *Vandepitte v. Preferred Accident Insurance Co.*, [1933] A.C. 70, [1933] 1 D.L.R. 289 (H.L.). In that case, the language of the policy was more compelling than in the case at bar yet the claim was dismissed. The automobile liability policy at issue there stated that the indemnity against third party risks would be available to any party operating the car with the permission of the insured. The House of Lords held that the assured's daughter, who had driven the car with the consent of the assured, was not an unnamed insured, and similarly rejected the argument that the daughter was entitled to claim in equity as the beneficiary of a trust. The judgment rests on the proposition that there must be a clear intention to include the unnamed party as an insured. In my view, neither of the two required conditions are met on the facts of the present case. The first point I would note with respect to the language of the policies is that they are plainly liability policies covering NAL. This is clear from para. 1 which provides:

This policy covers the liability of the Assured, assumed by contract or otherwise, for loss or damage to property, as defined in Clause 2, within the Dominion of Canada, arising from any cause whatsoever, in transit or otherwise, including any act or omission of the Assured or any of its employees, or anyone acting in its service, [subject to certain specified exclusions]. [Emphasis added.]

[140] The customers are asking not only that they be included as unnamed insureds but also that the policies be construed as being more than liability policies. I fail to see how, in the face of the explicit language of the policies, it could be possible to read them as I was invited to do by counsel for the customers, namely as if they were property or fidelity policies in their favour. The language of the policies simply will not bear the meaning the customers urge

upon the court. For an analogous case coming to the same conclusion, see *Bode v. Chubb Insurance Co.*, *supra*.

[141] It is argued that the language of para. 21 of the policy supports the position of the customers:

If at the time of loss or damage there is available to a named or unnamed insured any other insurance which would apply in the absence of this policy, the insurance under this policy shall apply as an excess insurance over such other insurance.

[142] The customers rely on the phrase “unnamed insured” as indicating independent rights in their favour. In my view, this provision cannot bear the weight the customers seek to place upon it. In the first place, it is plainly not intended to confer rights upon them as unnamed insured but rather to limit the rights of any party who happens to be an unnamed insured. Moreover, there is an explicit provision in the policy which contemplates unnamed insureds in a very specific situation not applicable to any of these customers (para. 12A), namely where NAL had direct access to a customer’s safe. This affords a coherent reading of the policies which does not require reading para. 21 as implying an independent right in favour of the customers.

[143] I have already dealt with the language of para. 3, the “loss payee” clause which, as I found above, does not in law confer independent rights of the customers.

[144] It was argued that as there was evidence that the customers would not have entrusted their property to NAL if it did not have insurance, the policy should be read as somehow reflecting that reliance. In my view that evidence takes the customers nowhere. First of all, as I have already noted, the customers are sophisticated commercial parties who are fully capable of determining the nature of the insurance carried by NAL. It is not denied that most, if not all, of the customers had their own property policies to cover the risk of loss. It may well be that they all would have insisted that NAL carry liability insurance, but that cannot turn a liability policy into a property or fidelity policy to which they are immediate parties. There is no evidence to support the proposition that at the time the policy was entered, there was an intention to confer the status of unnamed insured upon the customers. Moreover, there is evidence to the contrary. Two of the customers actually raised the question of acquiring rights to the insurance independent of NAL. The Liquor Control Board of Ontario wanted to be

shown as “additional assureds”. However, when the matter was raised by the local agent Mathews with Kelly Associates, Mathews was advised that this was not possible. The L.C.B.O. asked Wood to have them added as a named assured, but this was not done. The witness produced by the L.C.B.O. on discovery admitted that the certificates did not show the L.C.B.O. as an additional insured and that it took no steps to have the certificates or the policy amended. Canadian Capital Corporation wanted to have a “guarantee pay” provision. Again, Kelly Associates reported to Mathews that the underwriter would not agree to add Canadian Capital Corporation as a named insured.

[145] There is, in my view, no factual foundation for an estoppel argument. Lloyd’s made no representation that the policy was anything other than a liability policy in favour of NAL. Kelly Associates was authorized to issue certificates of insurance to National’s customers, but these clearly stipulate that the insurance is “all risk armoured car carrier liability” and that the insured is NAL. In my view, these certificates accurately reflect the fact that the policy is a “liability” policy and that NAL is the insured.

[146] For these reasons, I find that the customers have no rights against Lloyd’s independent of NAL as “unnamed assureds” or otherwise that are not affected by the defences Lloyd’s has to any claims by NAL.

Issue 9. If the customers have any such rights, is Lloyd’s entitled to deduct from the claims amounts recovered by the customers under other insurance policies in respect of the loss?

[147] By agreement of counsel, the evidence and argument on this issue (which I was told would have taken some considerable time) was not presented pending my judgment on the other issues. Accordingly, I make no findings on this issue.

CONCLUSION

[148] For the foregoing reasons, the claims of the customers against Lloyd’s are dismissed. Lloyd’s is entitled to a declaration as against NAL that the three contracts of insurance entered into on September 9, 1992 are void. Counsel may speak to me within ten days of the release of these reasons if there is any reason that the usual costs order should not be made; otherwise, Lloyd’s is entitled to its costs against the customers on a party and party basis, such costs to be assessed.

Order accordingly.

TAB 4

struck for failure to pay costs and default judgment was obtained from Justice Boswell on January 22, 2008. The default judgment was set aside by order of Justice Mulligan dated October 9, 2009. Assignment court for the scheduling of this motion was September 21, 2010. On the day before that appearance, the defendant filed for bankruptcy. By order dated October 25, 2010 the Registrar in Bankruptcy granted leave for RBC to continue to prosecute its claim. The defendant unsuccessfully appealed that decision before Campbell J.. In his reasons, Campbell J. noted that in addition to it being a matter of discretion for the Registrar, there was ample evidence on which the Registrar could find sufficient material prejudice to RBC to justify lifting the stay and lack of equitable grounds to deny it, including the suggested inability of the bankrupt to defend.

Decision

- [3] For the reasons that follow, the motion is granted and RBC shall have judgment against the defendant in the sum of \$6,373,897.53, calculated as of January 22, 2008. It is hereby declared that the judgment is a judgment in fraud within the meaning of s.178(1)(e) of the *Bankruptcy and Insolvency Act*.

The Evidence

- [4] The defendant has not filed an affidavit responding specifically to the motion for summary judgement. He relies on three dated affidavits, the first two sworn October 20 and 22, 2010 for the purposes of his bankruptcy proceeding, and the third sworn August 8, 2011, which was submitted to the Court of Appeal in respect of a motion for security for costs¹. It is from an affidavit of the defendant sworn January 22, 2008, filed in RBC's consolidated motion record², that the following evidence is provided:
- [5] On the evidence of the defendant, until November 2006 he was a highly successful entrepreneur presiding over at least a dozen businesses that collectively are referred to as the Hejna Group. The Hejna Group was one of the five largest employers in Muskoka, and had interests in six marinas, boat rentals, cottage rentals, development and construction. The defendant's personal net worth was in excess of \$30,000,000 and the companies were not in financial difficulty. He deposed that the combined revenue of the Hejna Group in 2006 was, to the best of his recollection, between \$15 and \$20 million.
- [6] The defendant deposed that he was courted by RBC in order to obtain the business of the Hejna Group. At a dinner meeting held in 2005, his evidence is that banking representatives told him that RBC would allocate between \$25 and \$30 million in aggregate financing to finance his business operations as well as future business expansions and operations. Shortly thereafter he transferred all of his banking to RBC. His evidence is that RBC provided funding for the operation of the Hejna Group, such that the total financing package with RBC was \$9 million in mortgages and lines of credit

¹ Brief of Affidavits dated July 31, 2012, Tabs 1-3

² Consolidated motion record, Vol. 2 of 3, tab 59

by the spring of 2006. The majority of his contact was with Wendy Sprung, the senior account manager for the branch at 5001 Yonge Street, and with Rosie Marrone at 200 Bay Street, where private banking was arranged for him. The defendant's evidence is that Ms. Sprung reassured him that RBC would look after all of his financing needs, and that the Bank did not want him to go elsewhere to obtain financing for his ventures. He has deposed that from mid-2005 until the end of November 2006, he was speaking to Ms. Sprung two to three times per week, and that she was intimately familiar with his businesses, his banking needs, and all transactions in his business accounts.

- [7] In particular, his evidence is that RBC was eager to provide funding for the acquisition of three new marinas in early 2006. He deposed that RBC committed to funding for those marinas, and that, relying on those commitments, he entered into binding contracts to acquire them and waived the financing conditions. His evidence is that Ms. Sprung assured him throughout that there would be no difficulty in obtaining approval for the necessary funding, which would include a mortgage, operating line of credit, and overdraft facilities.

- [8] The first of the three marina deals was scheduled to close in March 2006, the next in May 2006 and the last in July 2006. On the day before the first closing, the defendant's evidence is that he was advised by Ms. Sprung that the financing was not ready. The defendant stated that he borrowed hundreds of thousands of dollars from friends and family to close the deal because RBC was delaying the closing of the financing transaction. In his affidavit sworn August 8, 2011, the defendant deposed that on the date of their phone call, Ms. Sprung told him to deposit cheques from one of his businesses into the account of another business, through automatic teller machine ("ATM") deposits, so that RBC could certify the required funds. In the final sentence of paragraph 8 of that same affidavit, the defendant stated "I knew that Wendy monitored all of my accounts at the Bank, so she knew that this was being done". If, as the defendant suggests, Ms. Sprung specifically directed Mr. Hejna to take such a course of action, one is left wondering why this statement as to her knowledge is necessary.

- [9] The defendant deposed that he told Ms. Sprung in the spring of 2006 that he needed an additional overdraft to close the marina deals since the promised financing was delayed. He stated that there were probably ten conversations over a period of four or five months, in which he advised Ms. Sprung that he needed additional overdrafts to close the deals and operate the businesses, and once the promised funding came in the overdrafts would be completely eliminated. His evidence is that he explained to Ms. Sprung that he could manage to get all of the deals closed and keep the businesses operating until the promised funding came through, if she allowed the overdrafts. Ms. Sprung allegedly assured him that RBC would support him by allowing those overdrafts to occur. The defendant's evidence is that Ms. Sprung and her staff were aware that he was writing the cheques. Between April and November of 2006, there were hundreds of cheques, at one point 40 to 50 a day representing \$4 to 5 million in deposits over the ATM network. Because both the volume of cheques and the amount of the overdrafts were outside of the lending parameters, it is the defendant's evidence that someone in a more senior position than Ms. Sprung would have had to approve their clearance. It is his evidence that although in

retrospect this may appear to be akin to cheque kiting, he was not intending to be deceptive. Further, the entire time that these overdraft cheques were being written, no one from RBC called him to say anything was wrong. From his conversations with Ms. Sprung, he believed that RBC was aware of the overdrafts and how they were being created.

- [10] In summary, it is the defendant's evidence that he understood, because Ms. Sprung led him to believe, that he was being *authorized to make inter-account and inter-company deposits and transfers to make up any shortfall* that he had in funding the marina closings, and thereafter the marinas' operational expenses. Further, he says that Ms. Sprung led him to believe that she was aware that the proposed practice would result in overdrafts to the accounts due to the lack of existing funds and credit, and those overdrafts would be addressed once RBC finalized the new credit facilities.

- [11] In a subsequent affidavit sworn by the defendant on September 18, 2008³ in support of a motion to set aside the default judgment obtained in this matter, a different explanation is provided. At paragraph 75, after denying that he defrauded RBC, whether through cheque kiting or otherwise, he deposed that because RBC failed to provide him with certain promised financing in a timely manner, he used *existing* banking and credit facilities to address arising business commitments. Again, he states that any overdrafts that resulted from this practice were created with the knowledge and authorization of RBC, and it was at all times understood that this practice would cease once he was provided with the credit facilities promised to him and further, that any overdrafts resulting from those activities would be cleared using the new financing.

- [12] At paragraph 89 of that affidavit, the defendant deposed that it was Ms. Sprung who advised him that he should cover any shortfall in purchase and operating funding by using the existing RBC banking and credit facilities available to him. His evidence is that she did so knowing that neither he nor the Hejna Group had sufficient funds or credit on account at RBC to cover the cost of the marinas' closings and/or the marinas' commitments. He was advised by Ms. Sprung that any reliance on existing banking and credit facilities would only be for a short time since the promised financing would soon be in place. As a result, he was led by RBC to understand that he was *authorized to use his existing banking and credit facilities as a means of short term ad-hoc bridge financing*.

- [13] At paragraph 91 of that affidavit the defendant states that, acting on Ms. Sprung's authority, beginning in or around March of 2006 he began to rely on existing facilities to fund the marinas' closings and thereafter their operations. In order to maintain a positive bank balance in the various accounts, either he or his employees wrote a number of cheques and deposited them by ATM to effect inter-company transfers between those accounts. The defendant states that the transfer of large sums of money between the various business and personal accounts via ATM deposits was abnormal for those

³ Consolidated motion record, Vol. 1 of 3, tab 11(d).

accounts, but at no time did anyone at RBC, prior to November 2006, take issue with this practice.

- [14] In mid-August 2006, the first marina was given the credit promised, but the defendant states that it was insufficient to address the overdrafts created by both its own closing, as well as the other two. As a result, he continued the practice of relying on inter-account deposits to maintain his businesses until the promised financing for the latter two marinas was put in place.
- [15] At the time of the closings of the second two marinas, RBC had yet to deliver on its promises to finance. Again Ms. Sprung urged him to keep his business with RBC. The defendant's evidence is that it was clear to him from his conversations with Ms. Sprung that she was advising him to continue with what he asserts was the authorized practice of making inter-account transfers until the promised credit facilities were put in place.
- [16] Even after all of the marinas' closings, the defendant was writing and depositing a large number of cheques on a daily basis to effect inter-account transfers. The defendant asserts that each of those transactions was cleared by Ms. Sprung, or her counterpart who looked after the defendants' personal accounts, Ms. Marrone, or their staff members.
- [17] From conversations that the defendant had with Ms. Sprung and Ms. Marrone, he understood that the RBC security department discussed the activity in his personal and corporate accounts with them in the spring, summer and/or fall of 2006. In relation to those inquiries, Ms. Sprung and Ms. Marone both assured him that they had addressed any security concerns that RBC may have had. He understood this to mean that Ms. Sprung and Ms. Marrone had advised RBC security that the activity in his account was authorized.
- [18] On November 19, 2006 the defendant received a telephone call from Ms. Sprung and another senior banking employee asking him to come to see them in person the next day. They explained that all of his accounts had been frozen. In actuality, what occurred was that all accounts were immediately coded for deposit only, with ATM access blocked. On meeting with them the next business day, the defendant was introduced to two individuals from RBC security and was confronted with the Bank's concern over his activities. The defendant was advised that he would not be extended any further credit and was asked to find alternative financing to cover his full indebtedness to RBC, including any overdrafts.
- [19] In an affidavit sworn October 23 2008, Ms. Sprung has denied any allegation that she, on behalf of RBC, authorized the defendant to commit cheque kiting as a means of interim financing. Ms. Sprung paints a very different picture from that advanced by the defendant. Her evidence is that with respect to various loan requests made by the defendant on behalf of various companies, financial information that was requested in order to allow the loan applications to be processed was never received, despite numerous requests. At all times, the defendant and his controller were aware that RBC could not even consider his request for certain financing ventures because of the lack of financial

information provided. Further given the totality of the loan facilities applied for, the amount could only be authorized by a Credit Risk Manager having the authority to approve financing in the requested amount, which was beyond her own authority. She denies that she advised the defendant to cover cash flow shortfalls of one business entity by using loan facilities available and approved for a different business entity. Further, at no time did she authorize or suggest to the defendant that overdrafts be created in order to solve any cash flow shortfalls he was then facing. Her evidence is that the defendant was always aware that no overdraft privileges had been granted in any of the accounts, and in the event that an overdraft of a minor nature occurred she would either call or e-mail the defendant or his controller asking that the overdrafts be eliminated immediately.

- [20] Ms. Sprung was cross-examined on this evidence. The defendant has not been able to point the court to evidence generated from that cross-examination that would rebut Ms. Sprung's testimony that there was no reason for her to disbelieve the information that she received from the defendant or his controller, which was that any inter-company transactions were being done in the normal course of inventory buying and selling among the companies. She recalls being contacted by RBC's compliance department on only two occasions about these inter-company transactions, but that after speaking with the defendant and his controller their explanations seemed plausible to her, and she relayed that information to the compliance group.
- [21] Although the defendant's counsel frequently emphasized throughout argument his assertion that Ms. Sprung received daily reports, and therefore should have known of any irregular activity in the defendant's accounts, a close reading of her cross-examination transcript reveals that the daily reports only came to Ms. Sprung's attention if there was no money in the account on which a cheque or cheques had been written, and all that she would see is a net result showing a shortfall in any given account. Her evidence is clear that she did not have the means to examine the daily cheque-writing activity carried on by each of the Hejna Group entities within their account and the defendant's personal account.
- [22] RBC also relies upon the evidence of James Dickson, who is employed by RBC Corporate Investigation Services ("CIS") as a Senior Manager, Forensic Accounting⁴ (the "Dickson affidavit"). In a memo dated June 9, 2007, Mr. Dickson outlined his involvement in the investigation of this matter. It began on November 15, 2006 when CIS was notified of a number of irregular banking transactions involving the defendant's personal account as well as the accounts of the Hejna Group. The irregular activity identified in November 2006 involved millions of dollars in cheques that were drawn upon Hejna Group accounts both at RBC and other financial institutions each business day and deposited via ATMs to other Hejna Group accounts at RBC. In October 2006 alone, in excess of \$80 million was deposited to and withdrawn from the Hejna Group accounts at RBC. In tracing this activity, CIS was able to determine that the unusual activity had been continuing and growing between January 2006 and November 16, 2006,

⁴ Affidavit of James Dickson sworn December 19, 2007, Consolidated Motion Record, Vol. 3 of 3, tab G.

on which date the restrictions were placed on all accounts. Once RBC understood that the net cumulative unauthorized overdraft was approximately \$6 million, it also became clear that these funds were not in any of the RBC accounts. CIS then began a review and analysis of the transaction history of the accounts for 2006 which, as of the date of Mr. Dickson's memo, demonstrated the following characteristics:

- (i) the volume of activity in the accounts was not consistent with the seasonal nature of the businesses, and the volume of transactions through the bank accounts was increasing significantly even though business activities would have been substantially wound down for the winter;
- (ii) the majority of transactions in most of the Hejna Group accounts represented funds transferred to or from other Hejna Group entities, none of which had a significant external source of funds in comparison to the total funds deposited to the accounts;
- (iii) in the period leading up to November 16, 2006, the Hejna Group accounts almost always had a positive balance;
- (iv) the majority of payments were by way of cheques, signed by the defendant, which needed to be processed through the clearing system, as opposed to electronic funds transfers that would result in a simultaneous withdrawal and deposit;
- (v) an artificial float was created by the foregoing which grew continuously through 2006;
- (vi) funds were being transferred between companies that did not have any obvious business relationship during the period in question;
- (vii) a total of \$89,943,882.31 cycled through the defendant's personal account between January 1 and November 16, 2006; and
- (viii) once the restrictions had been placed on the accounts, effectively breaking the cycle of irregular transactions, the RBC accounts were all significantly overdrawn. The defendant's personal account was overdrawn in the amount of \$989,323.64 as of November 22, 2006.

[23] What next developed as a result of this meeting was that defendant entered into two forbearance agreements with RBC. The background to these forbearance agreements is

set out in an affidavit of Raymond Chang, a Vice-President with RBC⁵ (the “Chang affidavit”). RBC’s evidence is that the forbearance agreements were an accommodation granted by RBC to facilitate the defendant and the Hejna Group to pursue opportunities to stabilize their financial position and to secure refinancing for payment of the indebtedness. At paragraphs 46 through 48 of the Chang affidavit, RBC explains that as of November 24, 2006, the Hejna companies were in default of various covenants under the pre-forbearance credit facilities. Just as outlined in the Dickson affidavit, RBC had discovered that large numbers of cheques for significant aggregate amounts had been flowing through and between Hejna’s personal account and some of the various Hejna Group accounts to cause a dramatic artificial increase in the “float” (the time between the negotiation of the cheque and its clearance at the cheque-writer’s bank). The process by which this occurred was that cheques and other forms of transfers were written between the accounts of some of the Hejna companies in a circular fashion, which caused the loan position of the companies to appear to be within the authorized limits, when in fact, the unauthorized overdraft was constantly increasing. When the unauthorized overdraft was discovered by RBC, it was determined that it amounted to approximately \$6 million (almost \$1 million of which related to Hejna’s personal current account) over and beyond the authorized lines of credit of approximately \$9.8 million. By constantly making daily large transfers by cheque and other instruments, the unauthorized overdraft was successfully shielded from detection by RBC until mid-November 2006.

- [24] The first forbearance agreement was made on November 24, 2006⁶. The defendant was represented by counsel at Himelfarb, Prozanski at the time of its execution. He personally was a party to that agreement and signed on behalf of the various Hejna Group companies who were also parties to the first forbearance agreement. Recital “D” of the first forbearance agreement provides as follows:

As at the date hereof numerous defaults exist under the Credit Facilities and Security, including, without limitation, with respect to ***unpermitted excesses*** of approximately than \$6,000,000 (the “Bulge”, which together with the Facility Indebtedness and any other debts, liabilities or obligations owing to the Bank now or in the future shall be referred to as the “Indebtedness”) over agreed credit limits, resulting from uncovered liabilities arising from cheques written and issued by the Existing Borrowers and/or the Existing Guarantors on accounts maintained by the Existing Borrowers and/or the Existing Guarantors at the Bank. These defaults have not been cured and continue to remain outstanding. (emphasis added)

- [25] By virtue of Sections 5, 6 and 7 of the first forbearance agreement, the Hejna companies and the defendant himself: (i) acknowledged and confirmed the existence of defaults

⁵ Affidavit of Raymond Chang sworn April 17, 2007, Consolidated Motion Record, Volume 2 of 3, tab 41.

⁶ Consolidated Motion Record, Vol. 2 of 3, tab 42

under the pre-forbearance credit facilities and that RBC was entitled, without further notice or demand, to enforce its loan security; (ii) consented to the immediate enforcement by RBC of all remedies on the occurrence of an event of default under the forbearance agreement, including the appointment of an interim receiver, receiver or receiver and manager; and (iii) consented to the appointment of Grant Thornton Limited as a consultant to RBC.

- [26] The forbearance granted by RBC under the first forbearance agreement was conditional on RBC receiving \$1.5 million prior to January 31, 2007. This payment was not made and RBC entered into further negotiations with the defendant in order to negotiate a resolution to the outstanding issues in the banking relationship. As a result, a second forbearance agreement was entered into on February 15, 2007⁷. It included all of the parties to the first forbearance agreement together with certain other Hejna Group corporations controlled by the defendant. Again, included in the recitals to the second forbearance agreement is an acknowledgment that one of the defaults existing under the credit facilities and security included unpermitted excesses of approximately \$6 million over agreed credit limits, resulting from uncovered liabilities arising from cheques written and issued by certain of the debtor companies on accounts maintained at RBC.
- [27] The debtors defaulted under the second forbearance agreement, which led to RBC making a receivership application. Its application was granted by order of Justice Pepall dated April 20, 2007⁸, by which Grant Thornton was appointed as interim receiver of all of the current and future assets of the defendant and the Hejna companies. Significantly, the defendant did not oppose the receivership application and, in fact, consented to the order of Justice Pepall.
- [28] In September 2007, RBC sought and obtained written consent from the interim receiver to commence the within action. In its statement of claim RBC seeks a declaration that any judgment granted in the within action is a judgment in fraud within the meaning of the Bankruptcy and *Insolvency Act*. The claim seeks judgment in the sum of \$6,035,010.85 calculated as of November 22, 2006 and prejudgment interest thereafter, or alternatively as against the defendant the sum of \$989,323.64 calculated as of November 22, 2006, being the quantum of an overdraft existing in his personal account, with prejudgment interest thereafter.
- [29] The defendant does not deny that the above sums are owed to RBC, but denies any fraud or wrongdoing.

The Position of the Defendant

- [30] The defendant's position is that first, there is a genuine issue for trial as to whether RBC authorized the transactions involved. Second, the defendant argues that there is a genuine

⁷ Consolidated Motion Record, Vol. 2 of 3, tab 43

⁸ Consolidated Motion Record, Vol. 1 of 3, tab 12

issue as to whether the non-action of RBC, even if it did not specifically authorize the transactions, was such to raise in the defendant a *bona fide*, reasonable belief that RBC was aware of his transactions. Third, the defendant argues that RBC breached the forbearance agreements by taking steps that destroyed his credit rating and prevented him from obtaining new refinancing that would have allowed him to pay his debt with RBC. Fourth, the defendant argues that RBC has failed to act in a commercially reasonable manner in realizing on its security. Fifth, the defendant argues that RBC has failed in its duty to produce relevant documents, such that this court would be unable, on a motion for summary judgment, to have a full appreciation of the merits of the defences raised by the defendant.

Test on a Motion for Summary Judgment

[31] There are two issues to be determined on this motion:

- 1) Whether there is a genuine issue requiring a trial as to whether the defendant undertook conduct referred to as “cheque kiting”;
- 2) If the answer to that question is in the negative, whether there is a genuine issue requiring a trial as to whether cheque kiting is conduct falling within s. 178 of the *Bankruptcy and Insolvency Act*.

[32] The purpose of the change from “no genuine issue for trial” to “no genuine issue requiring a trial” in the test for summary judgment was to make summary judgment more readily available and to recognize that with the court’s expanded forensic powers, although there may be issues appropriate for trial, these issues may not require a trial because the court has the power to weigh evidence on a motion for summary judgment. As noted in *Healey v. Lakeridge Health Corp.* (2010), 72 C.C.L.T. (3d) 261 (S.C.) at para. 22, *aff’d* (2011), 103 O.R. (3d) 401 (C.A.), “Rule 20.04(2.1) is a statutory reversal of the case law that held that a judge cannot assess credibility, weigh evidence, or find facts on a motion for summary judgment.”

[33] As stated in *Canadian Imperial Bank of Commerce v. Mitchell*, 2010 ONSC 2227 at para. 20, the changed wording in the Rules, combined with the powers granted to the motions judge to make evidentiary determinations, necessarily permits a more meaningful review of the paper record and expressly permits the motions judge to make evidentiary determinations and credibility findings. “As a result, consistent with the new principle of proportionality in the Rules, cases or issues need not proceed to trial unless a trial is genuinely required”: *Cuthbert v. TD Canada Trust* (2010), 88 C.P.C. (6th) 359 (S.C.) at para. 10; *Canadian Imperial Bank of Commerce v. Mitchell*, *supra*, at para. 20.

[34] To succeed on a motion for summary judgment, the moving party must establish that there is no genuine issue of material facts requiring a trial with respect to a claim or defence: *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.) at pp. 549-50;

1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 21 O.R. (3d) 547 (C.A.). “[T]he test for summary judgment – whether there is a genuine issue of material fact that requires a trial for its resolution as first articulated in *Irving Ungerman Ltd. v. Galanis* [supra] - has not changed” under the new Rule 20: *Cuthbert v. TD Canada Trust*, supra, at para. 11. If the moving party establishes that there is no genuine issue requiring a trial, the respondent must then establish his claim as being one with “a real chance of success”: *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para.15.

- [35] The court must take a hard look at the evidence on a motion for summary judgment to determine whether there is, or is not, a genuine issue for trial, and may freely canvass the facts and law in doing so. The moving party bears the onus of establishing that there is no triable issue; however, the responding party on a motion for summary judgment must “lead trump or risk losing”: *1061590 Ontario Ltd. v. Ontario Jockey Club*, supra, at p. 557. A party opposing a motion for summary judgment must show a “real chance of success” against the party seeking summary judgment: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 27. Although the onus is on the moving party to establish the absence of a genuine issue requiring a trial, there is an evidentiary burden on the responding party, who may not rest on the allegations or denials in the party’s pleadings, but must present by way of affidavit, or other evidence, specific facts showing that there is a genuine issue for trial: *Cuthbert v. TD Canada Trust*, supra, at para. 12.
- [36] As stated in *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at para. 17, “The motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial.” It is not sufficient for the responding party to say that more and better evidence will or possibly may be available at trial. The respondent must set out specific facts and coherent evidence organized to show that there is a genuine issue requiring a trial: *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.) at p. 238; *Canadian Imperial Bank of Commerce v. Mitchell*, supra, at para. 18.
- [37] Even with the change to Rule 20, however, it is to be remembered that the purpose of Rule 20 is not to deny the parties due process. As stated in *Dawson v. Rexcraft Storage and Warehouse Inc.*, supra, at para. 29, “[i]t is not intended to deprive plaintiffs and defendants of their day in court absent demonstrated compliance with its requirements. . . [I]ts purpose is to weed out cases at the pre-trial stage when it can be demonstrated clearly that a trial is unnecessary”. This principle has been reiterated in the now leading case under Rule 20.04, *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (“*Combined Air*”), where at para. 38 the Court of Appeal emphasized that the purpose of the new rule is to eliminate unnecessary trials, not to eliminate all trials, and that the guiding consideration is whether the summary judgment process will provide an appropriate means for effecting a fair and just resolution of the dispute before the court.
- [38] *Combined Air* has of course articulated the “full appreciation test” as being that which the motions judge must apply to determine whether or not a trial is required in the interests of justice. The motions judge must ask the question: can the full appreciation of the

evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

- [39] The defendant relies on *Combined Air* for the direction found at para. 51 of that judgment, which is that, in a case that calls for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion generally cannot serve as an adequate substitute for the trial process. In those cases, as the defendant argues here, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. In such cases, the full appreciation test is not met and the interest of justice requires a trial.
- [40] At para. 54 of *Combined Air*, the court directs the motions judge to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues. Unless full appreciation of the evidence and issues is attainable on the motion record, the judge cannot be satisfied that the issues are appropriately resolved on a motion for summary judgment. The defendant argues that it is impossible for this court to come to a full appreciation of the evidence in this case because of a lack of documentary disclosure on the part of RBC, a matter which will be discussed further below.

Analysis

- [41] The statement of defence filed in this proceeding does not raise the same defences argued by the defendant on this motion. Further, at his cross-examination on December 16, 2008, the defendant's counsel admitted that the only defence being raised is that the circular flow of funds was authorized by RBC, or alternatively, that RBC acquiesced in the conduct⁹. Nevertheless, I will deal with each of them for the purpose of completeness.

RBC authorized the overdrafts

- [42] As he presents throughout his evidence, the defendant's primary defence is that RBC authorized the overdrafts. The allegations outlined in the statement of defence largely follow the evidence set out above: RBC promised to finance but did not do so in a timely manner, the account activity was a form of interim or bridge financing expressly or impliedly authorized by RBC through its authorized agents while RBC finalized its due diligence process, that the plaintiff was fully aware of the activities now being alleged against the defendant as cheque kiting, and the defendant at no time had formed an intent to either breach any of the lending facilities or undertake any wrongful or fraudulent activities as alleged.

⁹ Transcript of the cross-examination of Roland Hejna on December 16, 2008, page 110.

- [43] Throughout the defendant's affidavits is the assertion that RBC promised financing for the marina acquisitions. However, the defendant has not provided evidence as to the amount of the loans that he applied for in respect of each of the marinas. During the argument of the motion his counsel was unable to provide evidence of either the applications or the amounts. This topic was explored on the defendant's cross-examination in respect of the alleged promised financing for the second two marinas. He could not remember the dates that he applied for financing¹⁰. He was unable to produce a document whereby RBC committed itself to provide financing for a specific amount, although he believed that there were e-mails in existence. This theme repeats itself throughout the defendant's evidence; he states that he has been hindered from properly defending himself both because his computer had been seized when the receiver was appointed, and allegedly misplaced, and because RBC has allegedly withheld e-mails and other various documents that are relevant to the case. Both of these concerns are dealt with later in these Reasons. It was further admitted that he did not sue RBC for failure to provide financing, nor did he defend the receivership proceeding on the ground that he suffered damages due to the failure of RBC to provide financing as is now claimed¹¹.
- [44] The second aspect of this particular defence is that Wendy Sprung or other employees of RBC expressly or impliedly authorized the very account activity that was undertaken by the defendant and his companies. As indicated earlier, such an allegation is denied by Ms. Sprung specifically. On his cross-examination the defendant admitted that what he was relying upon for his assertion that Ms. Sprung encouraged him to make inter-company deposits to obtain funding was a series of undocumented verbal discussions over the telephone on no fixed dates. He could not indicate exactly the words used by Ms. Sprung, and he admitted that he did not tell her that a circular pattern of cheques would be used. He had no specifics to give concerning his claim of authorization to cheque kiting¹². The defendant recited one incident where Ms. Sprung advised him that he must keep the cheques that were deposited to the ATM machines below \$100,000 each, otherwise there would be an automatic hold triggered. When asked whether he ever told Ms. Sprung that he was writing cheques from accounts that had no money, or writing cheques from one company to another to another all on the same day, his response was "they knew all my companies"¹³. The defendant has admitted that the unauthorized overdrafts were created by him writing and depositing inter-company cheques all on the same day in a circular fashion¹⁴.
- [45] As earlier indicated in the evidence review, the defendant and his companies were intermittently given authorized loan facilities with RBC of approximately \$10 million between June 2005 and August 2006¹⁵. As alleged in the defendant's affidavit of September 18, 2008, Ms. Sprung told him that he should cover any shortfalls created by

¹⁰ Transcript of the cross-examination of Roland Hejna on December 16, 2008, page 87.

¹¹ Transcript of the cross-examination of Roland Hejna on December 16, 2008, pp. 116-117

¹² Transcript of the cross-examination of Roland Hejna on December 16, 2008, pp. 93-95

¹³ Transcript of the cross-examination of Roland Hejna on December 16, 2008, p. 95

¹⁴ Transcript of the cross-examination of Roland Hejna on December 16, 2008, p. 66

¹⁵ Chang affidavit, Consolidated Motion Record, Vol. 2 of 3, tab 41, paras. 13-45

the financing delay by the use of existing RBC banking and credit facilities. This would infer that RBC would permit the defendant to use the authorized funds not for the purpose of the entities for which the loan facilities were established, but rather for the new companies and in particular the new marinas. Not only is this highly unbelievable given the risk assessments and due diligence that any lending institution would undertake for a new corporate entity, particularly given the defendant's own evidence that marina financing can be problematic, but Ms. Sprung's evidence confirms that the limits of the authorized lending facilities were beyond her limits of authorization. Furthermore, the fact that the defendant has obtained from RBC over \$6 million beyond that authorized is directly contradictory to him accessing "existing RBC banking and credit facilities".

[46] The defendant's evidence is also that he understood Ms. Sprung to be aware that the inter-account and inter-company deposits would result in overdrafts to existing accounts due to lack of existing funds. However, until the date when restrictions were placed on the defendant's ATM banking, there were no overdrafts in any of the accounts due to the practice of the continual circular flow of funds. It was only after the forensic audit had begun that the excesses became apparent. As Ms. Sprung's cross-examination evidence confirms, the daily reports received by her would only notify her of an occasional overdraft, which she immediately addressed with the defendant or his controller because she was aware that overdrafts were not allowed.

[47] In his affidavit of January 22, 2008 the defendant deposed that Ms. Sprung specifically authorized additional credit facilities by way of overdrafts. If this had occurred, there would be no reason for the circular cheque activity to have continued, as authorization would have been given for fresh or enlarged credit facilities without the requirement of a circular flow of funds. Further, the defendant has no specifics about how much of an overdraft his companies were granted by Ms. Sprung. His evidence on this point was:¹⁶

Q: How much was the overdraft facility to be sir, a million, two million, a hundred thousand, what was it to be?

A: Whatever it needed because it was only temporary.

Q: No upper limit?

A: Only she knew what's the amount.

Q: I'm asking you, sir, this is your affidavit. I am asking you how much was the overdraft to be?

A: I think with everything together it was somewhere around \$6 million.

[48] The court finds this to be a rather convenient number apparently pulled from the air by the defendant during his cross-examination, given that the overdraft in all the accounts came to that total after the restrictions were placed on the defendant's accounts on November 16, 2006. However, as Schedule 1 to Exhibit 2 of the Dickson affidavit shows, the account activity in November, halfway through the month, was already well on its

¹⁶ Transcript of the cross-examination of Roland Hejna on December 16, 2008, page 90

way to exceeding the previous month's activity. In the month of October, 2006, \$80 million in deposits and withdrawals occurred in the defendant's personal and Hejna Group accounts. By November 16, 2006, deposits and withdrawals had already risen to close to \$60 million. In other words, if the unspecified overdraft was authorized to be "around \$6 million", the defendant was operating without regard to such limit in November 2006. And as noted in the Dickson affidavit, activity was escalating during months when there would have been a lull in the seasonal operation of most of these businesses.

- [49] The defendant also deposed that he borrowed money from friends and family in order to close the first marina purchase in March 2006. Presumably he did not need any additional funding prior to this, given that RBC had granted various loan facilities beginning in June 2005. Yet as explained in the Dickson affidavit, the circular deposit and withdrawal cycle began even before January 2006, although RBC has only analyzed those transactions occurring in the year 2006. The transactions that amount to cheque kiting also occurred in January and February 2006, even prior to the purchase of the first marina.
- [50] Finally, completely unexplained in the evidence is how close to \$1 million came to land in the defendant's personal account, when his defence is that his course of action was undertaken to fund the acquisition and operation of his business enterprises. Also unexplained is why close to \$90 million in transactions occurred in his personal account during the time in question, from transactions undertaken with other RBC accounts as well as other financial institutions and transactions with external parties.
- [51] The defendant asserts that Ms. Sprung was desperate to keep his accounts with RBC and essentially strung him along to keep his business, pacifying him as necessary in order to ensure that he did not obtain financing from another institution. He relies on an e-mail between Ms. Sprung and Vic Brownjohn, a senior risk manager, dated January 11, 2006¹⁷. In that e-mail Ms. Sprung was conveying that she was desperately trying to minimize adverse client impact created by a delay in providing the defendant with a verbal response from RBC before he left for a boat show. I disagree with the defendant's characterization of this document. First, as is clear from the Chang affidavit, this e-mail falls within the period in which RBC was extending credit facilities to the defendant and the Hejna Group which eventually reached approximately \$10 million. This memo could have related to any one of those loan facilities and indicated no association to the acquisition of the marinas. At least one of the businesses in which the defendant was involved was the purchase of boats. Clearly the defendant and his companies would have been an important client to RBC and, as this memo shows, Ms. Sprung was conscientious in terms of attempting to provide him with good service. However, it is a significant leap of logic to use this premise as the basis for proof of the proposition that Ms. Sprung would permit and encourage the type of activity carried on by the defendant.

¹⁷ Brief of Productions, tab 22

- [52] The defendant also put before the court several Business Banking Transaction Requests relating to one or two of the companies comprising the Hejna Group¹⁸. The defendant has not cross-examined any representative of RBC other than Ms. Sprung and therefore these documents can be given no weight, as their significance was not explained in the defendant's material. However, as set out above, the Chang affidavit indicates that there were ongoing financing arrangements being made between RBC and the defendant, to which these documents obviously relate. Beyond that the court is not able to draw any conclusions that would assist the defendant.
- [53] The same issue is raised by an e-mail of October 4, 2006 and an activity log printout from October 5, 2006 which refers to a hold being placed on one of the defendant's transactions that was completed through an ABM, resulting in his card being "hot carded" and the account designated as deposit only¹⁹. It appears from the document that the Fraud Detection Group was contacted, whereupon the hot card status and deposit only message were removed. Discussions were to take place with Fraud Detection to understand why the client was "hot carded" without consultation with the Account Management team. Again, in the absence of cross-examination this document can be given little weight. However, given that it was in the following month that investigation began into the unusual activity in the defendant's accounts, this communication is in no way an indicator that RBC was attempting to curry favour with the defendant by turning a blind eye to atypical transactions. Further, the author of the e-mail, who is a senior account manager, commercial banking, states "looks as though I will have an o/d situation again". The defendant points to that statement as evidence that RBC was aware of and acquiesced to the overdraft. However, as previously indicated, in the memo from Wendy Sprung dated August 29, 2006, she clearly communicated that the overdraft situation could not be tolerated²⁰. She wrote:

Roland the situation below, and the one you relayed to me in your message of this morning needs to be addressed with your staff at the various locations who are responsible for controlling the release of cheques. They need to understand that this practice of releasing cheques without available funds to cover needs to stop. As Mr. Dodd found out, if you release a cheque and haven't made sure that sufficient funds are on deposit to cover it when the cheque is released (not when the cheque is presented for payment) there is a risk that we won't pay it because of insufficient funds. We've also notice this with CFT on several occasions when we've been asked to send wire payments when there was no money to cover. We've allowed it in the past, assuming that it was just an oversight. However, this is now a regular occurrence so it appears

¹⁸ Brief of Productions, tabs 3, 14, 15 and 24

¹⁹ Brief of Productions, tabs 7 and 8

²⁰ Brief of Productions, tab 10

that there is a bit of inattention on the part of whoever is responsible for this company's account.

This also seems to be the case with several of the other companies as well. This morning on my excess report not only is New Ark overdrawn, so is Proline, Boatmax & Cdn Fishing Tour. Over the past several days Mobile and Balsam have also appeared. Roland we need to talk about this because this is happening too often, and in some cases for several days in a row. There are risks for you if this continues, so we need to find a way to significantly reduce the frequency.

- [54] It was suggested that this memo is proof of RBC's knowledge of his account activity, and he was entitled to rely on that knowledge to continue in the same vein. It was submitted that this court should accept that there is an air of reality to his belief. To the contrary; it is inconceivable that what is referred to in this memo as accounts being "overdrawn" is the equivalent to RBC having knowledge that the defendant had created an unauthorized overdraft in his various accounts of collectively over \$6 million. If RBC had this type of concern in August 2006 with overdrawn accounts, suffice it to say that it would be exponentially alarmed upon learning that the defendant and his companies had accessed over \$6 million through the method that he employed. The defendant's defence boils down to this: they failed to catch me, and therefore my conduct should be excused.
- [55] In addition to the gross weaknesses in the defendant's evidence outlined above, the defendant's primary problem with advancing such a defence is the wording of the forbearance agreements, which contain clear admissions that the overdrafts were unpermitted excesses over agreed credit limits. This wording is in direct contradiction to the position taken by the defendant in this action. The defendant signed both of these agreements with the assistance of legal counsel.
- [56] The defendant has attempted, without pleading such, to place the negotiations surrounding these agreements into question. At the cross-examination on his affidavit sworn September 18, 2008, the defendant's evidence was that he did not want to sign the first forbearance agreement due to the specific wording of "unpermitted excesses" but was talked into it by a "representative for the Bank", Mr. Jaffer. Mr. Jaffer is actually an employee of the court-appointed interim receiver. He also testified that he signed it because he felt that he had no other choice.²¹ This is not a matter raised either in his statement of defence or the affidavit of September 18, 2008. The defendant has never attempted to secure the evidence of Mr. Jaffer on this point. Further, counsel for RBC requested an undertaking for production of the Himelfarb Proszanski file to support the allegation that the defendant's counsel had communication with RBC relating to the use of the words "unpermitted excesses", and any advice rendered to the defendant with respect to those words. The defendant's counsel refused such production, and that refusal

²¹ Transcript of the cross-examination of Roland Hejna on December 16, 2008, page 10 to 17

was maintained to the date of argument of this motion. In his affidavit of documents sworn February 16, 2011 the defendant does not list any communication or documents generated by the Himmelfarb Prozanski firm as being relevant to this action.

- [57] With respect to the second forbearance agreement, the defendant's cross-examination evidence is again that, although represented by the Himmelfarb Prozanski firm, he was blackmailed into signing the agreement.²² Again he has no documents or other evidence to support this bald allegation.
- [58] If the defendant seriously believed that he signed the forbearance agreements under duress, while disagreeing with wording documenting that the overdrafts were created by the writing of cheques beyond the approved credit facilities, such an allegation would be central to his defence and would not have been raised for the first time at a cross-examination in December 2008, over a year after this action was commenced.
- [59] As earlier indicated, the defendant did not file any material in the receivership application to dispute the order sought. This was the case even though he was in possession of the Chang affidavit, which fully set out the allegations being made against him. At paragraph 48 of the Chang affidavit, the evidence before Justice Pepall was that "by constantly making daily large transfers by cheque and other instruments, the unauthorized overdraft was successfully shielded from detection by the Bank until mid-November 2006". Given that it is the defendant's central argument that RBC had knowledge of, encouraged and/or acquiesced to these daily transfers, it makes little sense, nor is it explained in his evidence, why he did not provide the court with his version of events at the time of the receivership application. Instead, he consented to the order made.
- [60] Also of significance is that the defendant has not documented that he ever objected to the content of any of the reports filed by the receiver, which refer to an "unauthorized overdraft" of approximately \$6 million that was included in the defendant's indebtedness to RBC. The defendant admits that he received these reports. In its eleventh report dated November 28, 2008, the receiver wrote at page 6 that it was only after RBC's examination of the defendant on July 17, 2008 that the receiver learned that the defendant had brought a motion to set aside the judgment on the basis that the overdrafts had been approved by RBC. The receiver wrote: "Roland Hejna had not previously advised the Interim Receiver that in his view the overdrafts had been authorized by RBC". And although the receiver granted leave to RBC to sue the defendant in fraud based upon cheque kiting, he has never complained to the receiver that such leave should not have been granted, due to no cheque kiting or fraud having been committed.
- [61] In his affidavit sworn October 22, 2010 the defendant deposed that he has consulted approximately half a dozen financial consultants and three bankers since 2007, all of whom confirmed to him that it is impossible to deposit an average of 20 to 30 cheques a day, totalling millions of dollars per day, and to subsequently withdraw those amounts

²² Transcript of cross-examination of Roland Hejna on December 16, 2008 page 20 to 26

regularly, without RBC's knowledge and consent. He states that it is simply untenable for RBC and its representatives to assert under oath that a period of six months elapsed, during which cheques totalling about \$300 million were cashed without RBC's knowledge, when these deposits were about 40 times larger than his companies' normal revenue. He stated in that affidavit that he had no doubt that a banking expert would confirm this assertion. However, the defendant filed no such evidence by way of expert's report or otherwise for use on this motion, despite the time lapse of approximately 5 years. Further, the defendant has failed to show that Wendy Sprung or any account manager would have seen \$80 million going through his account in one month, or \$300 million in six months, despite his attempts to gain such an admission during her cross-examination.

- [62] Although the evidence of Ms. Sprung discloses that she had communication with both the defendant and his controller throughout their business relationship, the complete absence of any reference to this controller in the defendant's affidavits, or evidence from this individual, permits me to draw the inference that his or her evidence would not assist the defendant on this motion or at trial in terms of supporting the allegation that the defendant's belief was *bona fide* and reasonable.
- [63] As the Dickson affidavit shows, it took the forensic accounting department significant work to trace and document the account activity, and that even by June 2007 some transactions were still in the process of being traced. This contradicts the defendant's unsupported assertion that it would have been obvious to the compliance department, or someone in a management position senior to Ms. Sprung, that the defendant was building an artificial float throughout 2006.
- [64] It is plain and obvious to this court that there is no need for trial processes to unfold in order for a determination to be made that RBC has successfully made out its claims with respect to cheque kiting. This primary defence of the defendant cannot be made out, a conclusion easily reached on the record before the court. This motion for summary judgment has been an extant since 2010 and the defendant has had ample and ongoing notice of the claims against him and the case to be met. Notwithstanding, he relies on evidence and raises arguments that are untenable given the overwhelming evidence presented by RBC, which I find proves that at no time prior to November 2006 was it aware of or prepared to permit the defendant to access additional funds beyond his approved credit facilities. Accordingly, I have been able to determine upon a full review of the record that this court can reach a full appreciation of the evidence and issues required to make dispositive findings by way of summary judgment, rendering a trial unnecessary with respect to this defence.
- [65] I am in the same position with Mr. Hejna's evidence as Karakatsanis J. was in *Cuthbert v. TD Canada Trust*, supra, when she wrote at para. 42 and 44:

I am satisfied that Cuthbert's evidence is not credible and does not raise an issue requiring a trial. Although I have not had the benefit of observing his demeanour during his testimony, courts have long

recognized that demeanour can be misleading and is but one factor in assessing credibility. Credibility is best tested against common sense, inherent consistency and consistency with contemporaneous and undisputed documents. I have numerous sworn statements – three affidavits and two cross-examinations – relating to this issue and numerous undisputed documents with which to test his evidence.

...

In these circumstances, I am satisfied that there is a strong evidentiary basis upon which to make findings of credibility, to draw inferences and to weigh the evidence. I am satisfied that the interests of justice do not require that this issue should be resolved at trial...

The defendant held a bona fide, reasonable belief that RBC was aware of his transactions

- [66] As the preceding section reviews the evidence and analysis relevant to this defence, it will not be repeated. For the same reasons set out above, the plaintiff has met the onus of showing that there is no need, in the interests of justice, for a trial.

RBC breached the forbearance agreements

- [67] The defendant had not pled, nor has he demonstrated, that RBC breached the forbearance agreements. If RBC had done so, one would expect that his counsel would have raised such an obvious defence at the time of the receivership application. The defendant was represented by counsel at that time, and he has presented no evidence that such an issue was ever raised before now. Further, the order of Justice Pepall made in the receivership application indicates that it was made on consent. This negates any possibility that the defendant had any meritorious defence to the receivership application, or that it should be permitted to be raised at a trial.
- [68] The defendant also does not put forth any evidence showing that he did not breach the forbearance agreements. His counsel suggests that RBC has failed to prove that he did. However, RBC has provided evidence through the first forbearance agreement that the Hejna Group was to repay \$1,500,000 prior to January 31, 2007, but says that it did not. RBC cannot prove a negative. The defendant has not shown that such a sum was paid. With respect to the default under second forbearance agreement, RBC has provided evidence through such agreement that the Hejna Group was to repay \$1,500,000 on or before April 15, 2007, a further \$500,000 on or before May 30, 2007, \$1 million on or before June 30, 2007, and was to repay all of the indebtedness in full to RBC prior to July

31, 2007. It is RBC's evidence that the defendant defaulted under the second forbearance agreement as well, and he has provided no evidence that the above obligations were met. Under the terms of both forbearance agreements, the forbearance period terminated immediately without notice on the occurrence of such default, after which RBC could proceed to exercise any right or remedy available to it.

- [69] With respect to RBC's alleged involvement in destroying the defendant's credit rating, during argument of this motion the court asked the defendant's counsel to point to evidence showing that he had tried to obtain alternative financing through another commercial lender, or that his credit rating had been affected by RBC as he alleges, but no such evidence was proffered.
- [70] Accordingly, with respect to this proposed defence the court is in a position to assess that there is no merit to the defence as advanced, and accordingly it is not in the interests of justice to require a trial on this issue.

RBC failed to act in a commercially reasonable manner

- [71] With respect to the alleged failure to act in a commercially reasonable manner, the defendant again has not pled this in the statement of defence. The defendant argued that the evidence proffered by him, in the form of the letter from Irwin Jacobs, shows that he had an investor who was prepared to pay RBC in full, but that RBC refused to release information to Mr. Jacobs. The letter does not support such a contention; in no way does it suggest that Mr. Jacobs was committed to financing of this magnitude. The contents of the letter, in addition to being unhelpful to the defendant, is hearsay; no affidavit was obtained from Mr. Jacobs even though – along with additional hyperbole that one would not expect from a professional businessman – he wrote: "...Further, I am going to offer my side of the story to Roland's lawyer if he should need me as a witness in any litigation against RBC only because your letter to me was so outrageous and untruthful...Whatever else I have to say about you, RBC, Grant Thornton and/or anyone else on your side that was involved in the Roland Hejna disaster will most likely be said under sworn testimony in a court of law in Canada".
- [72] Although the defendant asserts that there is not enough before the court for it to determine whether a full appreciation of this proposed defence can be reached, this is the only evidence that the defendant points to in support of his defence. He has not provided evidence showing that RBC improvidently liquidated assets, and indeed he could not, since the interim receiver was in charge of doing so.
- [73] Accordingly, with respect to this proposed defence the court is in a position to assess that there is no merit to it as advanced, and accordingly it is not in the interests of justice to require a trial on this issue.

RBC has failed in its obligation to produce documents relevant to the defence

- [74] The defendant alleges that RBC has not fully met its obligations pursuant to the Rules to produce all documents that are relevant to the action, and he infers that RBC has deliberately withheld documents that would assist in his defence.
- [75] The initial hearing date for this motion for summary judgment was December 22, 2010, which was obtained at an assignment court on September 21, 2010. Counsel for RBC had given the defendant notice of his client's intention to bring forward a motion for summary judgment as early as February 1, 2010, with the request for a timetable for completion of all matters required prior to the motion. RBC's counsel was unable to secure agreements from the defendant that would permit the motion to proceed in an orderly fashion, necessitating the scheduling hearing on September 21, 2010. During the late afternoon of September 20, 2010, the defendant filed a voluntary assignment into bankruptcy. The motion was scheduled for December 22, provided that leave could be obtained prior to that date. Leave was obtained from the Registrar in Bankruptcy to continue with this action. On December 21, 2010 counsel for the defendant delivered a motion record returnable December 22, 2010, claiming that in order to properly defend the motion for summary judgment, production of all documents in the possession of RBC was required. The affidavit sworn by the defendant in support of that motion, as earlier indicated, stated that it was the intention of the defendant to retain a banking expert to review RBC's internal documentation to support his position.
- [76] The motion for summary judgment came before McEwen J. on December 22, 2010, who ordered that it be adjourned on terms that each of the parties was to deliver an affidavit of documents by February 15, 2011. RBC's affidavit of documents was to include production of the credit file for all of the Hejna Group. Also, any additional responding material to the motion for summary judgment was to be delivered by April 30, 2011.
- [77] RBC proceeded to deliver an affidavit of documents in accordance with the order, with the Schedule "A" to the Affidavit of Documents consisting of 53 pages.
- [78] Thereafter, no effort was made by the defendant to review any of the documents listed by RBC in accordance with his request made in December of 2010. He also delivered no further responding affidavit material to the motion for summary judgment.
- [79] On March 7, 2012, Lauwers J. fixed the hearing date for the motion for summary judgment to be July 30, 2012, peremptory upon the defendant. This date was pushed back to August 2, 2012 for reasons not explained to the court, but on that date the defendant's counsel appeared to seek an adjournment, advising the court that he was unaware of the date due to internal issues in his office, and stating that he wished to file further affidavits. As a term of the adjournment, a consent order was made by McKelvey J. that gave the defendant until August 17, 2012 to attend at Mr. Greenglass' office to inspect productions, and a further week to deliver a list of productions to be put before the court as agreed evidence together with any of the other productions requested by RBC. It was also agreed on consent that the next appearance would be peremptory for the defendant.

- [80] The defendant took no steps to examine the documents as set out in McKelvey J.'s order.
- [81] The defendant now argues that the record is not fully complete and therefore this court could not fully appreciate all of the issues set out above in this action until it is in a position to assess the extent of RBC's understanding and knowledge of the transactions in question.
- [82] At para. 56 of *Combined Air* the court wrote:

By adopting the full appreciation test, we continue to recognize the established principles regarding the evidentiary obligations on a summary judgment motion. The Supreme Court of Canada addressed this point in *Lameman*, at para. 11, where the court cited Sharpe J.'s reasons in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434, in support of the proposition that "[e]ach side must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried." This obligation continues to apply under the amended Rule 20. On a motion for summary judgment, a party is not "entitled to sit back and rely on the possibility that more favourable facts may develop at trial": *Transamerica*, at p. 434.

- [83] This paragraph is a complete answer to this aspect of the defendant's argument. The fact that he has failed to be pro-active in placing what he considers to be crucial information before the court does not create, in this case, a lacuna in the court's ability to undertake analysis of and reach a full appreciation of the evidence. The court is entitled to deal with the record in its present state, on the assumption that no further or better evidence would be available at trial: *Dawson v. Rexcraft*, supra, at para. 17; *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.* (1994), 22 O. (3d) 25 (Gen. Div.) at pp. 27-28; *Cuthbert v. TD Canada Trust*, supra, at para. 12. It was the defendant's obligation to ensure that all of the evidence on which he intended to rely was put before the court on this motion. That his counsel failed to take even the preliminary step of inspecting the voluminous documents listed in RBC's affidavit of documents, particularly when no explanation was given for that failure, should not prevent the court from dealing with this case as the law permits it to do.
- [84] Although the defendant has asserted that he lost his personal computer and records, and was without funding, this can in no way explain his failure to at least inspect RBC's documents. At the time that the orders were made by Justices McEwen and McKelvey, and following, the defendant has been represented by counsel.
- [85] I find the defendant's assertion that RBC has failed to meet its disclosure obligations to be without merit, and therefore has no impact on the conclusions reached with respect to the various defences raised by the defendant and discussed in the preceding sections.

Did the defendant engage in cheque kiting?

[86] I find that the plaintiff has met the onus of showing that there is no genuine issue requiring a trial in order for this court to reach the determination that the defendant knowingly undertook conduct referred to as cheque kiting. The evidence supports the conclusion that the defendant knowingly engaged in cheque kiting by inter-account deposits and withdrawals through a daily series of cheques. As set out in the Dickson affidavit, the defendant was also involving Hejna Group accounts maintained at BCP Bank, HSBC and other financial institutions.

[87] The practice of cheque kiting was explained in *Royal Bank of Canada v. Location Bristar Idealease Inc.*, 2012 QCCS 211 (CanLII) at paras. 7-10 as follows:

Essentially, the illegal practice of "cheque kiting" begins when a cheque is issued from a bank account whose balance is insufficient to cover it. To create confusion, money is recorded in more than one bank account at one moment in time. In most cases, the money is in transit or quite simply fictitious. The circulation of cheques between various accounts is jointly controlled. Here, the scheme was operated by the administrators of Bristar and JMB.

Thus, cheques and registered funds are circulated from one bank to another and from one account to another, in a manner that maintains fictitious bank balances in some accounts while depositing the very same amounts in other accounts.

Obviously, masterminds who undertake this type of fraud take advantage of the clearance periods that are inherent to cheque processing in the banking system.

Cheques are circulated so quickly that an account at one banking institution is debited one day and credited the next. Over time, the false increase in bank balances varies from one bank to another, until one of the banks involved realizes that it is part of a kiting scheme and denounces the fraud...

[88] This is exactly what occurred in this case, although most of the transactions occurred between RBC accounts as described in the Chang and Dickson affidavits. The defendant does not deny that the cheques were deposited and withdrawn in this fashion, in order to produce cash flow. The evidence presented by RBC leads overwhelmingly to the conclusion that the defendant engaged in cheque kiting through the circular cheque-writing activity to which he admits.

Is cheque kiting an activity that falls within s. 178 of the *Bankruptcy and Insolvency Act*?

[89] Section 178 (1) of the *Bankruptcy and Insolvency Act* provides:

An order of discharge does not release the bankrupt from

...

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Québec, as a trustee or administrator of the property of others;

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

...

[90] RBC seeks to have the judgment declared to be a judgment in fraud in order that it will survive any discharge from bankruptcy. In this case the allegations of fraud by way of cheque kiting have been pled with particularity and have been strictly proved. As set out in *McKee (Re)*, (1997), 47 C.B.R. (3d) 70 at paras. 34-39, the test under s. 178(1)(e) is whether the bankrupt has been deceitful. Quoting from *Derry v. Peek*, (1889) 14 A.C. 337 (H.L.), Master Funduk summarized the law by stating that to make out deceit, there must be proof of fraud, which is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it to be true or false. To prevent a false statement from being fraudulent, there must always be an honest belief in its truth.

[91] As set out under the Analysis section of these Reasons, this court has found that the defendant could not have held an honest belief that he was acting without intent to defraud. Any explanation given by him by way of justification for obtaining over \$6 million in unauthorized credit does not stand up under any scrutiny. I find that the defendant was deceitful in advising RBC that he was undertaking transactions through the ATM machines for legitimate business activities, in transferring funds to his personal account, and in undertaking transactions in a way that created an artificial float that allowed his conduct to go undetected by RBC, and that by doing so he obtained property in the form of currency to which he was not entitled. It is telling that although he admits to owing the money to RBC, he has provided no evidence of repayment of any portion of it, or even of attempts to do so.

[92] Accordingly, I find that the judgment obtained by RBC is a civil finding of both false pretences and fraudulent misrepresentation on the part of the defendant, within the meaning of s. 178(1)(e) of the *Bankruptcy and Insolvency Act*. Due to that finding I will not proceed with an analysis of whether cheque kiting is a fraud that falls within the ambit of s. 178(1)(d) of that Act.

Costs

[93] At the request of the court that each party submit its Costs Outline for the motion, RBC submitted a Cost Outline at the conclusion of the argument of the motion which was dated August 2, 2012, as it was prepared in anticipation of the appearance before Justice

McKelvey. The Costs Outline of RBC seeks a fee claim of \$17,308.34 calculated on a partial indemnity rate, and \$22,986.59 calculated on a substantial indemnity rate. This Cost Outline anticipated success on the motion, and therefore claimed all costs of the action except those involving prior cost awards.

- [94] Counsel for the defendant submitted a Cost Outline in which total costs of the action are also claimed, which calculates partial indemnity fees at \$21,640.00 and substantial indemnity fees at \$36,367.50.
- [95] Having regard to the factors outlined in Rule 57.07(1), it is first noted that RBC was seeking to recover a judgment of over \$6 million plus interest, and was successful in doing so. The costs sought by RBC are at least commensurate with the value of its lawsuit, if not less than.
- [96] In terms of complexity, the result sought by RBC is not one that should ever be made lightly and without sufficient evidence. In order to meet its evidentiary burden, considerable work was undertaken to secure the appropriate affidavits, cross-examine the defendant, prepare three volumes of a motion record and three supplementary motion records, a factum and supplementary factum and books of authorities. Additional work was necessitated by the fact that the defendant sought and obtained two adjournments of previous dates for the argument of the motion. The filing by RBC's counsel of additional material helpfully updated the court on matters transpiring between adjournments. While RBC was put to these costs, the defendant did nothing to take advantage of the additional time provided to him by these adjournments to improve upon the case presented to the court.
- [97] The hearing was of vital importance to both sides due to the potential result. The material filed by RBC demonstrated that its counsel put significant effort into thoroughly preparing for this hearing, reflected in the helpful oral argument of counsel at the hearing.
- [98] Turning to Rule 57.01(1)(0.a), the partial indemnity rates set out in the Costs Outline of RBC are within the Practice Direction established by the Costs Subcommittee of the Civil Rules Committee. It is noted in that Practice Direction that these are, normally, to be maximum rates when fixing partial indemnity costs. However, beyond that, the Rules require only that partial indemnity costs be awarded in accordance with Part I of Tariff A. It mandates that counsel fees be determined in accordance with s. 131 of the *Courts of Justice Act* and the factors set out in Rule 57.01(1). Wide discretion in fixing costs therefore remains with the court, bearing in mind the principles enunciated in the leading Ontario cases such as *Anderson v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557 (Ont. Div. Ct.), *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), and *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66.
- [99] However, this is a case in which fraud on the part of the defendant has been successfully made out, and therefore the court is entitled to consider that fact both under Rule 57.01(1)(g) or (i), and under the common law. The successful proof of fraud has been the

basis for awards of substantial indemnity costs in our jurisprudence: *Blackburn v. Midland Walwyn Capital Inc.* (2005), 126 A.C.W.S. (3d) 22 (S.C.J.), aff'd 195 O.A.C. 181 (C.A.), leave to appeal refused 212 O.A.C. 397n; *Reno-Depot Inc. v. Wonderland Commercial Centre Inc.* (2008), 171 A.C.W.S. (3d) 477 (Ont. C.A.); *Kepic v. Tecumseh Road Builders* (1987), 18, C.C.E.L. 218 (Ont. C.A.); *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1990) 75 O.R. (2d) 513 (Gen. Div.); *Rumble v. 853207 Ontario Ltd.* (1993), 43 A.C.W.S. (3d) 716 (Ont. Ct. (Gen. Div.)). An award on this scale is granted only in rare and exceptional cases to mark the court's disapproval of either the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement: *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), leave to appeal to S.C.C. refused 114 D.L.R. (4th) vii; *Stiles v. British Columbia (Workers' Compensation Board)* (1989), 39 C.P.C. (2d) 74 (B.C.C.A.). In this case I have considered the magnitude of the fraud and sizeable loss to RBC, which it may never be able to recover, the length of time over which the conduct occurred, and the failure of the defendant to admit to his wrongdoing, and have determined that this is a case in which it would be appropriate to award costs on a substantial indemnity basis to deter like-minded individuals and to express the court's condemnation of the fraudulent activity.

- [100] Turning to Rule 57.01(0.b), the court is required to consider the amount of costs that the defendant could reasonably have expected to pay in relation to this motion. In this case it is apparent that the defendant, through the fees sought in his own Costs Outline, was anticipating that he would pay at least as much as is being sought by RBC if it was successful on the motion.
- [101] At this point in the analysis it is essential, as directed by the Court of Appeal in *Boucher*, to step back and consider the result produced and assess whether, in all the circumstances, the result is fair and reasonable. The first point to be made is that this action was one necessitated entirely by the conduct of the defendant, thereby putting RBC to the cost of retaining counsel to attempt to recover the monies wrongfully taken by the defendant. This action has been ongoing since 2007, and there have been a large number of interlocutory steps taken that have not been fully outlined in these Reasons. Many of these steps have involved the defendant wasting time and costs, such as failing to attend at an examination because he was experiencing jet-lag. A review of the full record reveals that the defendant's conduct lengthened the proceeding unnecessarily. Even taking into account that Mr. Greenglass has excluded from his Costs Outline those steps that have already been the subject of cost orders, despite the defendant's conduct Mr. Greenglass has spent a moderate amount of time on this file. This court is satisfied that the fees and disbursements outlined in RBC's Costs Outline on a substantial indemnity basis are fair and reasonable in all of the circumstances of this case.
- [102] In addition to that, time has been spent since August 2, 2012 to again prepare for the presentation of this motion, and its argument took a full day. Mr. Greenglass did not give an indication of the time spent in this intervening period, but I am satisfied that it would have exceeded the amount of preparation shown by Mr. Klotz in his Costs Outline, given that Mr. Klotz did not prepare any further material other than a Brief of Productions prior

to the hearing date. Mr. Klotz shows 9.2 hours for preparation and attendance, which will be used by the court as the measure by which to reflect the additional fees to be awarded to RBC. At the rate of \$475, which is 1.5% of Mr. Greenglass' partial indemnity rate, the additional fees are \$4,370 plus HST. Accordingly, the total fees to be awarded to RBC on a substantial indemnity basis are \$27,924.69 inclusive of HST. To that will be added the reasonable disbursements claimed of \$1,409.24 inclusive of HST, for a total cost award of \$29,333.93.

Order

[103] This court orders that a final judgment shall issue in the following terms:

1. This court orders that the defendant Roland Hejna shall pay to the plaintiff the sum of \$6,373,897.53 for claim and pre-judgment interest calculated as of January 22, 2008.
2. This court declares that the judgment granted in paragraph 1 above is a judgment in fraud within the meaning of the *Bankruptcy and Insolvency Act*.
3. This court orders that the defendant Roland Hejna shall pay to the plaintiff its costs of this action in the sum of \$29,333.93.
4. The order shall bear interest on the sum of \$6,373,897.53 at the rate of 6.0 percent per year commencing January 22, 2008.
5. The order shall bear interest on the sum of \$29,333.93 at the rate of 6.0 percent per year from the date of this order.

HEALEY J.

Released: August 26, 2013

C O R R I G E N D A

1. Page 27, para. 103 (4) now reads: The order shall bear interest on the sum of \$6,373,897.53 at the rate of 6.0 percent per year commencing January 22, 2008.

TAB 5

[APPELLATE DIVISION]

1930

MCCREA (Plaintiff) *Respondent*

February 14

V. BARHAN-JENKINS COMMISSION COMPANY

(Defendant) *Appellant*

AND RABY (Defendant)

Principal and Agent—Buying of Cattle—Whether Commission Firm Undisclosed Principal of Buyer — Purchase Money Deposited by Firm to Meet Buyer's Cheques—Diversion of Fund by Buyer—Dishonour of Cheques—Liability of Firm to Seller.

Courts—Findings of Fact—Reversal of on Appeal.

Held that the relationship between the defendant firm and the defendant R. with respect to purchases of cattle which R. bought from the plaintiff was not that of undisclosed principal and agent as found by the trial Judge, but that R. had bought the cattle for himself and had consigned them to the defendant firm to be sold for him on a commission basis (Per Curiam; Hyndman, J.A. dissenting).

Kidd v. Harden; McConnal v. Harden [1924] 3 W.W.R. 293, 20 Alta. L.R. 606, distinguished as to the liability of the defendant firm to the plaintiff, since, although the arrangement between the defendants herein for the financing of R.'s purchases was similar to that in *Kidd v. Harden*, the default in carrying it out was that of R., and not, as in that case, that of the commission firm.

Appeal from a judgment by Boyle, J. in favour of the plaintiff in an action to recover the balance of the purchase-price of cattle. The judgment appealed from was based on the finding that the appellants were the principals of the defendant Raby who had bought the cattle from the plaintiff. The facts as stated in the judgment of Mitchell, J.A. were as follows:

"The evidence discloses that for a considerable period the defendant Raby had been engaged in the business of buying cattle and had, in his direct employ, one Chivilo whose duty it was to locate cattle that might be for sale by farmers in the district adjacent to Macleod, and complete the purchase and obtain delivery of the same. The cattle were paid for by signed blank cheques on the Bank of Montreal, Lethbridge, on an account in the name of 'C. Raby, Trust Account;' and Chivilo was permitted to fill in the cheques in each instance.

App. Div.
1930

McCrea
v.

Barhan-
Jenkins
Commission
Co.
and Raby

"Apparently it was the practice that the selection of the cattle, their quality and the price to be paid, was left to the judgment of Chivilo and at any rate with respect to this lot, neither Raby nor the defendant company appear to have exercised any supervision.

"It was arranged between the two defendants that the defendant company should provide the necessary funds to pay for cattle bought and to deposit same to the credit of C. Raby, trust account, in the bank in Lethbridge, where Raby had his headquarters. The defendant company carried on the business of commission merchants at Calgary as a partnership, the firm consisting of Messrs Jenkins and Barhan. As cattle were purchased and ready for delivery Chivilo would advise Raby of the purchase and the latter would then obtain the required funds from the defendant company to meet cheques on the Raby trust account in settlement of these purchases. In this, as well as in the case of other cattle purchases, the cattle were consigned in the name of the defendant company, as consignor and also consignees. The bill of lading was signed 'Barhan-Jenkins per E. Chivilo.' The delivery and shipment was made in this way on instructions from Raby to Chivilo and apparently this procedure was followed at the instance of the defendant company and for the latter's supposed protection in respect of these moneys.

"Upon arrival at destination these cattle were sold and the proceeds, less the commission charges, were credited to the defendant Raby by way of repayment of the defendant company's advances.

"In this case the plaintiff was unable to obtain payment of the cheque in question on account of insufficient funds in the Raby trust account. This was presumably due to the fact that Raby had diverted to other uses funds furnished by the defendant company specifically to pay for cattle to be purchased by Raby. Upon this situation being disclosed to the defendant company by Raby, on information from Chivilo, the company, at the request of Raby with some reluctance and to avoid any trouble, deposited a further sum of \$1,500 in the trust account but this also proved insufficient owing to

the payment of other cheques presented in priority to that held by the plaintiff."

The appeal was heard by HARVEY, C.J.A., HYNDMAN, CLARKE, MITCHELL AND LUNNEY, JJ.A.

A. Macleod Sinclair, K.C., for defendant, appellant, Barhan-Jenkins Commission Company.

J. D. Matheson, K.C., for plaintiff, respondent.

February 14, 1930.

HARVEY, C.J.A. agrees with Mitchell, J.A.

HYNDMAN, J.A. (dissenting)—Whilst I am prepared to admit that a very strong argument was made on behalf of the appellant, nevertheless, after the most careful consideration, I am not convinced that the learned trial Judge was clearly wrong in the conclusion at which he arrived, namely, that Raby was in fact and reality not a principal but was an agent or employee only for the purpose of buying cattle and particularly these cattle for the defendants—who were the real purchasers.

The only ground on which we would be justified in reversing this finding of fact would be that there was no evidence to support it.

There is no doubt that on the surface it would appear that Raby was an independent cattle dealer, and the so-called bill of sale has his name printed upon it. But there are certain peculiar and unusual features outstanding in the case which throw much doubt upon that contention.

Had this been a single isolated transaction between Raby and the defendants probably such a contention might prevail. But when it is considered that Raby was an execution debtor; that he had been doing business in the same way with the defendants since they acquired the business from the Mayland Co. in February, 1929, and previously had been doing business in this way with Mayland; that is, the defendants furnishing the money for him to pay farmers for the cattle which he bought, and which were immediately shipped to the defendants, as *consignors* as well as consignees; that the full

App. Div.
1930

McCrea
v.
Barhan-
Jenkins
Commission
Co.
and Raby

App. Div.
1930
—
McCrea
v.
Barhan-
Jenkins
Commission
Co.
and Raby
—
Hyndman,
J.A.

purchase-price was furnished by the defendants and deposited in a bank, not to the credit of "C. Raby" but "C. Raby trust account," it seems to me that all these circumstances must cause a reasonable man to immediately ask himself the simple question, "Was Raby an agent or not?" Perhaps it is only right to say that this raises a strong suspicion only and not proof sufficient for a Judge or jury to legally decide that he was in fact an agent.

But in my view there is other evidence which supplies the necessary legal ground or evidence upon which to properly conclude that Raby was an agent only and that the defendants were his undisclosed principals. I refer to the examination of the defendant Jenkins as follows:

"Q. And I suppose, Mr. Jenkins, they 'phoned up to you in the usual way about this shipment which was being bought?
A. This particular shipment?

"Q. Yes? A. Mr. Raby happened to be in Calgary right at the time.

"Q. And informed you about this shipment? A. Yes.

"Q. And that they were buying and sending it to you?
A. Yes.

"Q. And did you send him the money? A. Yes, might I explain a little further what I did?

"Mr. Sinclair: Yes? A. Would it be all right?

"Q. Mr. Matheson: Yes, it is all right with me. A. He asked me if I would let him have the money to lift these two loads of cattle and I told him yes. He first said it would take \$4,200.00, and in a little while he said to send \$4,000 would be all right. I sent down \$4,000.00 in the usual way to Mr. Raby's trust account, Bank of Montreal, Lethbridge. Before the day was over Mr. Jene Chivilo 'phoned back up and said 'Where is the money to pay for these cattle? It is about \$1,500.00 short of paying for these two loads of cattle from Macleod.' There were 54 head shipped that day, I think. I said, 'Well, there is something wrong. I have sent the money to pay for those cattle and there is something wrong, and I

will not send any more money.' That was on Saturday, I believe, and Mr. Barhan and I talked it over and said 'Look, here, rather than have any trouble here, we will send on the money to finish paying for these cattle,' the \$1,500.00, and very foolishly we sent it the same way to Mr. Raby's trust account, Lethbridge, and somebody grabbed that \$1,500.00. That made \$5,500.00 which we sent down to pay for two loads of cattle, *which we bought.*"

App. Div.
1930
—
McCrea
v.
Barhan-
Jenkins
Commission
Co.
and Raby
—
Hyndman,
J.A.

It may be said that this was just a slip of the tongue. But I fancy if it had been we would have heard an explanation of it from counsel and an effort to correct it made. No explanation or qualification was offered so far as I am aware.

If defendants were, as they contend, only commission agents or brokers, it is somewhat peculiar that they would speak of "buying" when their only business was "selling." It looks to me as though he unwittingly told the exact truth.

All issues which could arise from the evidence, it was agreed between counsel, are open for the Court to adjudicate upon. Had the trial been with a jury I am of the view it would have been proper for the Judge to leave the question of fact of agency to the jury to decide, and to point out to them this piece of evidence that they might give such weight to as they felt disposed. If they regarded that as confirming their suspicions arising from the other facts and circumstances that defendants were the real purchasers, I think they would have been entitled to do so.

A word as to the so-called "trust account." Defendants assert that they loaned this money to Raby. If it was a pure loan why place it in a trust account? If it was a real trust account for whom was it in trust? Surely not Raby himself, or for unknown vendors of cattle. I am persuaded to think that in case of attachment of these moneys the defendant would claim them as being theirs.

The whole picture looks to me as being one in which the defendants devised a scheme or plan to take over the benefits of Raby's contracts without a corresponding responsibility. Had the cattle been seized under an execution on the railway,

App. Div.
1930

McCrea
v.

Barhan-
Jenkins
Commission
Co.
and Raby

Hyndman,
J.A.

or in the stockyards, I feel certain the defendants would have claimed them as having paid for them with their own money; whereas if their present contention is correct they would be mere creditors of Raby for money lent.

As I said before, I think the words of Jenkins, "which we bought," are amply sufficient to supply the necessary legal evidence to remove the matter out of the realm of suspicion into that of proof, upon which the Court could and did decide the case.

I would, therefore, dismiss the appeal with costs.

CLARKE, J.A. agrees with Mitchell, J.A.

MITCHELL, J.A.—In this action tried by Boyle, J. sitting without a jury judgment was given in favour of the plaintiff herein.

The judgment is based upon the finding of the learned trial Judge that the appellant company was the principal in the transaction rather than merely a commission merchant receiving the cattle from the real purchaser in the capacity of agent.

[Here the learned Judge set out the facts as above.]

Nowhere throughout the evidence can I find material conflict of testimony. It was sought to establish that defendant Raby was the agent of the defendant company as undisclosed principal and judgment was given accordingly. I find nothing in the evidence to indicate that this division of the Court is in a less favourable position to draw conclusions as to facts than was the learned trial Judge, for the veracity of the witnesses or their conduct do not appear to be materially in issue.

It seems clear to me, and there is no evidence to the contrary, that the defendant Raby and the defendant company were carrying on separate and distinctive types of business, the former as a cattle buyer, reselling through the medium of a commission merchant firm, at a profit or loss as the case might be, and the latter as commission merchants, selling cattle upon a commission basis, presumably on the usual

terms, whatever they may have been. Chivilo had been in the employ of Raby for years extending back to the time when Raby had carried on a similar business and dealing with the Mayland commission firm, the predecessors of the defendant company, under very similar circumstances.

No representations direct or implied were made by defendant company to the plaintiff and the latter was unaware of any relations between Raby and defendant company with respect to financing. The plaintiff in his evidence makes it quite clear that he understood that he was selling to Raby through the latter's representative Chivilo; and it may also well be that he thought he was selling for cash in the light of the circumstances under which he accepted the cheque. This phase, however, of the case may be considered later, keeping in mind the fact that the plaintiff neglected to take immediate steps to assert any rights he may have had on that ground, other than the presentation of the cheque in the ordinary way through the Royal Bank in another town, Macleod; and in the face of doubts that had arisen as to whether or not Raby's cheque would be paid upon presentation, by reason of Chivilo having to plaintiff's knowledge refused to guarantee other cheques drawn on Raby's account for other cattle purchases made at this time.

Up to this point it is apparent that the plaintiff thought he was dealing with Raby as a principal and the only grounds for holding that he was not could only be found in the circumstances of the consignment of the cattle to defendant company as consignor as well as consignee by Chivilo on Raby's instructions. It is also contended that the existence of Raby's trust account in connection with the funds advanced by the defendant company further strengthens the agency viewpoint and that the advance of a further \$1,500 to the trust account is further confirmation of this.

Having in mind all the facts and circumstances which are here recited in detail, it is apparent that the reasonable and natural conclusion to be drawn is that the defendant Raby and the defendant company were carrying on business as separate entities; that for reasons of its own the defendant

App. Div.
1930

McCrea
v.

Barhan-
Jenkins
Commission
Co.
and Raby

Mitchell,
J.A.

App. Div.
1930

McCrea
v.

Barhan-
Jenkins
Commission
Co.
and Raby

Mitchell,
J.A.

company saw fit to financially assist Raby in his operations, that the plan of consignment was an attempt to prevent complications arising from the possible intervention of Raby's judgment creditor and that the establishment of the Raby trust account was a further means to that end and ensure, if possible, that the funds would be used for the purpose intended; that the plaintiff thought he was dealing with Raby as principal and had no knowledge at the time of sale of any business arrangements existing between Raby and the defendant company and in no way depended upon the latter for payment. To view the matter in any other light would be to disregard the evidence as to what the actual relations as between the parties were and which, in my opinion, would naturally be expected in the conduct of these respective classes of business.

The learned trial Judge placed reliance upon the case of *Kidd v. Harden*; *McConnal v. Harden*, 20 Alta. L.R. 606, [1924] 3 W.W.R. 293, but the facts of this case distinguish it from *Kidd v. Harden*. There the default was on the part of the defendant who received the cattle and who in breach of his agreement failed to pay the purchase-price of the cattle into the purchaser's trust account as it was held he was bound to do. In this case the defendant company did pay the full amount required to pay for the cattle into the trust account of the purchaser Raby and the default was on his part.

It is also distinguishable from the Irish case of *Loughnan v. Barry and Byrne* (1872) Ir. R. 6 C.L. 457, cited in the *Kidd* case, *supra*. The principle of that decision was that there was misrepresentation in giving the cheque when there were no funds to meet it which entitled the seller to rescind the contract, but that is not the position taken by the plaintiff in this case; on the contrary, he sued upon the cheque which would be an affirmation of the sale. I think he could not in any event have successfully rescinded for two reasons. First, the fair inference from the evidence is that he knew there were not or might not be at the time funds in the bank sufficient to meet the cheque, his bank had ascertained the fact and to his knowledge the buyer's agent, Chivilo, was asked to guarantee a cheque given to another seller at the same time. He says

at p. 48: "And Jene (Chivilo) said he couldn't guarantee that the cheque was good so I think these other fellows must have 'phoned to Lethbridge, but I didn't pay any attention to the cheque because Jene had bought cattle for us before for Raby and it was always good;" and secondly, the defendant company had after the shipment of the cattle and probably after the sale of them by such defendant actually paid to the trust account a sufficient sum to enable Raby to pay the plaintiff and but for the improper diversion of the money by Raby the plaintiff's cheque would have been paid. There was no privity between the plaintiff and the defendant company and the latter should be treated as a *bona-fide* purchaser for value. There is also the fact that the plaintiff delayed making any claim upon the defendant company until after it had changed its position by remitting the \$1,500 to Raby's trust account.

The appeal should be allowed with costs and the action against the company dismissed with costs, including examinations on discovery. Rule 27 not to apply.

LUNNEY, J.A. agrees with Mitchell, J.A.

Appeal allowed with costs; Hyndman, J.A. dissenting.

J. D. Matheson, K.C. solicitor for plaintiff, respondent.

A. Macleod Sinclair, K.C., solicitor for defendant appellant, Barhan-Jenkins Commission Company.

App. Div.
1930

McCrea
v.

Barhan-
Jenkins
Commission
Co.
and Raby

Mitchell,
J.A.

TAB 6

In the Court of Appeal of Alberta

Citation: Alberta Securities Commission v Hennig, 2021 ABCA 411

Date: 20211214

Docket: 2001-0018AC

Registry: Calgary

Between:

Alberta Securities Commission

Respondent
(Applicant)

- and -

Theodor Hennig

Appellant
(Respondent)

The Court:

**The Honourable Justice Jack Watson
The Honourable Justice Ritu Khullar
The Honourable Justice Dawn Pentelechuk**

**Reasons for Judgment Reserved of The Honourable Justice Khullar
Concurred in by The Honourable Justice Watson**

**Reasons for Judgment Reserved of The Honourable Justice Pentelechuk
Concurring in the Result**

Appeal from the Order by
The Honourable Justice B.E. Romaine
Dated the 17th day of January, 2020
Filed the 21st day of February, 2020
(2020 ABQB 48, Docket: 0801-16295)

Reasons for Judgment Reserved

The Majority:

I. Introduction

[1] One of the fundamental objectives of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (*BIA*) is to give bankrupt debtors a fresh start by releasing pre-existing debts, but the *BIA* also provides that some debts can continue after discharge of the bankrupt in certain circumstances. In this appeal, a Panel of the Alberta Securities Commission (ASC) imposed, among other things, an administrative penalty and costs order against Mr Hennig, which was filed with the Court of Queen's Bench becoming enforceable as a judgment debt. The question is whether the ASC's debt falls within one of the exceptions contained in s 178(1) of the *BIA* and therefore survives discharge of the bankrupt. Specifically, the issues are whether the debt amounts to "a fine, penalty or restitution order imposed by a court in respect of an offence" (s 178(1)(a)) or whether it is a debt or liability "resulting from obtaining property by false pretences or fraudulent misrepresentation" (ss 178(1)(e)).

[2] For the reasons below, I find that the ASC's debt does not fall within either exception. Accordingly, the debt was released upon discharge, and the appeal is allowed.

II. Background

[3] This appeal arises from allegations against Mr Hennig who was the CFO of various corporations, another individual Mr Workum who was the president, and the various corporations with which both were involved: Proprietary Industries Inc (PPI), Cheshire Capital Inc, Lexington Capital Corp, Strategic Investment Funds and Ashland Holdings Corp.

[4] The allegations relate to misrepresentations and other defects in PPI's financial statements and disclosure for the years 1998-2000, failure to disclose secret commissions, market manipulation, failure to file reports of insider trading between 1995-2002 and misrepresentations to ASC staff in the course of their investigation of Mr Hennig and others.

[5] After 38 hearing days and 24 witnesses, an ASC Panel concluded that Mr Hennig and Mr Workum had contravened Alberta securities laws or acted contrary to the public interest or both:

- the Individual Respondents contravened Alberta securities laws, or acted contrary to the public interest, or both:
 - through their involvement in and responsibility for:
 - the issuance of PPI's 1998, 1999 and 2000 Financial Statements that were not prepared in accordance with

Canadian generally accepted accounting principles ("GAAP") and contained misrepresentations; and

- related misrepresentations in other PPI disclosure;
 - through their involvement in and responsibility for PPI's failure to disclose the Individual Respondents' receipt of financial benefits from commission payments made by PPI;
 - by engaging in a course of conduct that, directly or indirectly, created or might have resulted in an artificial price for securities of Newmex Minerals Inc. ("Newmex");
 - by failing to file required insider trade reports; and
 - by making misrepresentations to Staff; and
- Strategic and Cheshire contravened the Securities Act, R.S.A. 2000, c. S-4 and its predecessor in force until 1 January 2002 (the "Act") and acted contrary to the public interest by engaging in a course of conduct that, directly or indirectly, created or might have resulted in an artificial price for securities of Newmex.

Workum and Hennig, Re, 2008 ABASC 363 at para 6 (Merits Decision).

[6] The ASC Panel issued its decision on sanction later that year, *Workum and Hennig, Re*, 2008 ABASC 719 (Sanctions Decision), and imposed on Mr Hennig a permanent ban from serving as a director and/or officer of any issuer; a 20-year cease trade and denial of exemptions order; and required payment of an administrative penalty of \$400,000 and hearing costs of \$175,000.

[7] On December 29, 2008, the ASC filed certified copies of the Merits Decision and the Sanctions Decision at the Court of Queen's Bench pursuant to s 200(1) of the *Securities Act*, RSA 2000, c S-4 which provides that upon filing the Decisions have "the same force and effect as if [they] were a judgment of the Court of Queen's Bench". In this case, because the sanction includes an administrative penalty, s 200(2) applies: "the administrative penalty may be collected as a judgment of the Court of Queen's Bench for the recovery of debt". Upon registration, the administrative penalty becomes enforceable as a judgment debt.

[8] The ASC issued a writ against Mr Hennig at the Court and the Personal Property Registry.

[9] Mr Hennig and Mr Workum unsuccessfully appealed the Merits Decision and the Sanctions Decision to this Court: 2010 ABCA 405.

[10] On July 4, 2011, Mr Hennig made an assignment into bankruptcy. On September 6, 2011, the ASC filed a proof of claim in the amount of \$601,932.43 and asserted that its claim would survive bankruptcy pursuant to ss 178(1)(a), (d), or (e) of the *BIA*.

[11] On August 19, 2015, Mr Hennig was discharged from bankruptcy. The ASC did not appear, nor did it object to the discharge.

[12] When it came time to renew its judgment three years later, the ASC sought a declaration from the Court of Queen’s Bench that its debt arising from the administrative penalty and associated costs survive Mr Hennig’s discharge from bankruptcy. The chambers judge granted the ASC’s application: *Alberta Securities Commission v Hennig*, 2020 ABQB 48 (QB Decision). Mr Hennig now appeals the QB Decision to this Court.

III. Queen’s Bench Decision

[13] The chambers judge took a broad, remedial approach to interpreting the *BIA* and relied on the facts as found in the Merits Decision to conclude that the ASC’s debt survived discharge because it is a “debt or liability resulting from obtaining property or services by false preferences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim”: s 178(1)(e). Alternatively, the chambers judge held the ASC’s debt survived discharge because, in the circumstances of this case, it was a “fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail”: s 178(1)(a). The chambers judge dismissed the argument that the debt survived bankruptcy under s 178(1)(d) and there is no cross-appeal on this issue.

[14] Mr Hennig argues that the chambers judge erred in both conclusions. With respect to s 178(1)(e), he argues that the ASC made no findings of fraud against him, that his allegedly fraudulent statements were not addressed to the ASC, that there is no evidence or finding that anyone transferred property as a result of the allegedly fraudulent statements and that the nature of the ASC’s public interest jurisdiction is insufficient to bring its debt within s 178(1)(e). With respect to s 178(1)(a), Mr Hennig argues the exemption only applies to fines or penalties imposed by courts in criminal or quasi-criminal proceedings, and not administrative penalties.

[15] Whether an administrative penalty and costs order imposed by a securities commission and registered as a judgment with a superior court can survive discharge of a bankrupt debtor has not been addressed by a Canadian appellate court.¹

¹ Two trial level decisions, in addition to the decision under appeal, have held that administrative penalties and other orders imposed by a provincial securities commission survive discharge of the bankrupt under s 178(1)(a) and s 178(1)(e): *Smlylski (Re)*, [2020] AJ No 1258 and *Poonian (Re)*, 2021 BSCS 555; leave to appeal to the BCCA granted: 2021 BCCA 224. The reasoning in each was influenced by the reasons of the chambers judge in this case.

IV. *Bankruptcy and Insolvency Act and Interpretive Approach*

[16] There are two general goals of the *BIA*: to provide for the equitable distribution of a bankrupt's assets among creditors and to facilitate a bankrupt's financial rehabilitation: *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 32 (*Moloney SCC*); *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 at para 7, 128 DLR (4th) 1. This appeal is concerned with this second goal. The purpose of s 178 has been described as giving the debtor a fresh start and enabling the debtor to become a contributing and useful member of the community, including the business community.

[17] Section 178 is divided into two sections.² Section 178(2) contains the general goal of granting a fresh start: "Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy." This section does not extinguish such claims, rather it renders them unenforceable: *Moloney SCC* at paras 64-66.

[18] Section 178(1) lists a number of exceptions identified by Parliament: claims or debts not released by discharge of the bankrupt. The exceptions cover a wide range of debts and money claims including fines and penalties imposed by a criminal court, judgments for civil damages for sexual assault or wrongful death, judgments ordering payment of spousal support or child support, debts or liabilities arising from breach of fiduciary duty, debts or liabilities arising when property is acquired as a result of false pretences or fraudulent misrepresentations, and certain unpaid student loans.

[19] The group of exceptions as a whole has been described as relating to immoral or dishonest conduct of the bankrupt and some cases say that the purpose of s 178(1) is to make sure that the bankrupt does not benefit from his or her dishonest or otherwise reprehensible conduct. That is true in a loose way of some exceptions in s 178(1). For example, s 178(1)(e) is designed to ensure that a bankrupt is not rewarded for fraudulent conduct, but it says nothing about other reprehensible behaviour: *Jerrard v Peacock*, 1985 CanLII 1148 at paras 44, 61 AR 16. It is more accurate to say s 178(1) reflects a number of disparate policy choices by Parliament reflecting different considerations. There is no master-rationale for all the exceptions. Courts have recognized this for some time: *Jerrard v Peacock* at paras 41-46; Lloyd W Houlden, Geoffrey B Morawetz & Dr Janis P Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009) (update 2021-3), Part VI, H§63(1), Online.³

[20] This Court has observed that people become bankrupt for various reasons, many of them blameworthy in some way: *Moloney v Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2014 ABCA 68 at para 14, aff'd 2015 SCC 51. By enacting s 178(2), Parliament has decided that most bankrupts are entitled to a fresh start after a discharge, regardless of morally blameworthy conduct that might have led them into bankruptcy in the first place. A bankrupt's "wrongdoing or improper conduct is not itself sufficient to bring a debt within the ambit" of s 178(1): *Korea Data*

² The full text of s 178 is found in Appendix A to these reasons.

³ Referred to hereafter as Houlden, Morawetz & Sarra.

Systems (USA), Inc v Aamazing Technologies Inc, 2015 ONCA 465 at paras 63-64. A court's view of immoral or dishonest conduct is not a license to provide an exception where it is not clearly stated. Only the debts specifically identified in s 178(1) survive and hinder the debtor's fresh start post-bankruptcy. As the Supreme Court of Canada recognized in *Moloney SCC* at para 79:

Parliament expressly selected which debts survive bankruptcy and which are discharged: s. 178(1) and (2). It did so having regard to competing policy objectives. This is a delicate exercise, because the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate.

[21] So, how should a court approach interpretation of the exceptions in s 178(1) and ss 178(1)(a) and (e) in particular?

[22] The starting point, as always, is the modern approach to statutory interpretation. 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": EA Driedger, *Construction of Statutes*, (2nd ed 1983) at p 87 as cited in *Rizzo & Rizzo Shoes Ltd (Re)*, [1999] 1 SCR 27 at para 21, 154 DLR (4th) 193. Also important is s 12 of the *Interpretation Act*, RSC 1985, c I-12 which deems all federal statutes to be remedial and requires courts to give them such fair, large, and liberal interpretations as best assures attainment of its objects: *Bell Express Vu Limited Partnership v Rex*, 2002 SCC 42 at para 26.

[23] While the modern approach to interpretation requires attention to context and purpose, the ordinary meaning of the words still anchor the analysis: *R v Garland*, 2021 ABCA 46 at para 51; *Haida Nation v British Columbia (Forests)*, 1997 CanLII 2009 at paras 22-23, 153 DLR (4th) 1 (BCCA).

[24] The legislative purpose of s 178 is to create exceptions to the objective of giving bankrupt debtors a fresh start. When Parliament has chosen language that circumscribes the application of an exception, we must respect the policy choice reflected by that language. We are effectively invited by the Commission to give a 'large and liberal' reading to the exception in s 178(1)(e) of the BIA so as to include within it forms of morally unacceptable conduct beyond the specifically targeted "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation". In *Schreyer v Schreyer*, 2011 SCC 35 at paras 19-20, the Supreme Court addressed the interplay between the fundamental objectives of the BIA and statutory exemptions:

The very design of insolvency legislation raises difficult policy issues for Parliament. Legislation that establishes an orderly liquidation process for situations in which reorganization is not possible, that averts races to execution and that gives debtors a chance for a new start is generally viewed as a wise policy choice. Such legislation has become part of the legal and economic landscape in modern societies. But it entails a price, and those who might have to pay that price sometimes strive mightily to avoid it. ... Other types of exemptions that seem fair

or even necessary are set out in the *BIA*. However, the more exemptions there are, the less likely it is that the basic policy objectives of insolvency legislation can be achieved.

As a consequence, the interpretation of the *BIA* requires the acceptance of the principle that every claim is swept into the bankruptcy and that the bankrupt is released from all of them upon being discharged *unless the law sets out a clear exclusion or exemption*. (emphasis added)

[25] So, the proper approach to interpreting the exemptions in s 178(1) starts from the position that every debt is released on a discharge of the bankrupt unless one or more of s 178(1)'s subsections clearly exempts the debt from release. The exemptions should be construed narrowly and applied only in clear cases: *Korea Data Systems* at paras 62-63; Ruth Sullivan, Halsbury's Laws of Canada (online), HLG, *Legislation* "Determining Legislative Intent, Presumed Intent, Strict and Liberal Construction" (VIII.4.(2).(d)) at HLG-97. That approach is justified because the more debts that survive discharge by falling within s 178(1) the more difficult it becomes for a bankrupt debtor to be rehabilitated: *Maloney* SCC at para 79.

[26] The approach articulated here is different than that taken by the chambers judge. She incorrectly identified the purpose of s 178(1) as ensuring that debtors who engage in reprehensible, dishonest, or immoral conduct do not receive the benefit of discharge: QB Decision at para 17. She then found that Mr Hennig's conduct was reprehensible, dishonest or immoral and rationalized the circumstances as falling within the exceptions under s 178(a) and (e) – a bit of reverse engineering. If the focus remains squarely on the financial rehabilitation of the bankrupt, which is the purpose of s 178, then discharge should be granted subject only to very specific exceptions. Section 178(1) does *not* specifically exempt *all* debts arising from reprehensible or dishonest conduct, only those identified in that section. In effect, the chambers judge took a purposive and remedial approach to interpreting only the exceptions in s 178(1)(a) and (e), rather than s 178 as whole, which resulted in shifting the delicate balance achieved by Parliament.

V. Securities Act

[27] Before considering whether the ASC's debt falls within ss 178(1)(a) or (e), some background about the *Securities Act*, the ASC proceedings and the ASC Panel's findings against Mr Hennig is necessary.

[28] Broadly speaking, securities law in Canada has two purposes: consumer protection, protecting investors from unfair or improper practices and fostering fair and efficient capital markets which includes maintaining confidence in those markets: *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 41; David Johnston, Kathleen Doyle Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (Markham, Ont: LexisNexis, 2014) at 3.

[29] The ASC has wide powers to intervene in Alberta capital markets and make orders if it determines it is in the public interest to do so: ss 198(1) and 199 of the *Securities Act*, RSA 2000, c S-4. Under s 198(1), such orders include requiring a person to cease trading, suspending or terminating registration of a person or company, prohibiting a person from acting as a director or officer, prohibiting a person or company from disseminating any type of information, requiring a person or company to pay to the Commission any amounts obtained, or losses avoided as a result of non-compliance with Alberta securities laws. Under s 199, the ASC may order a person who has contravened Alberta securities law to pay an administrative penalty of up to \$1 million, if it is in the public interest to do so. Sections 198(1) and 199 are regulatory rather than remedial or punitive in the sense that their purposes are to protect investors and prevent harm to capital markets, not to punish for past wrongdoing: *Committee for Equal Treatment* at para 42.

[30] The regulatory approach to enforcement of securities law and practice contrasts with other enforcement options under the *Securities Act*: *Committee for Equal Treatment* at para 43. Orders made under s 198(1) and 199 are supposed to restrain future conduct likely to be prejudicial to the public interest in fair and efficient capital markets, sometimes by removing those parties whose past conduct raises concerns about their future conduct. This is in contrast to criminal penalties. It is the role of the courts, typically the Provincial Court in Alberta, to *punish* past misconduct in accordance with s 194 of the *Securities Act*, which provides that any person or company that contravenes Alberta securities laws is guilty of an offence and liable to a maximum fine of \$5 million and/or a maximum prison term of five years less a day: see *R v Peers*, 2017 SCC 13, affirming 2015 ABCA 407,

[31] Two Notices of Hearing set out the allegations against Mr Workum and Mr Hennig, and the related corporate entities in the ASC proceedings. The first related to “alleged improprieties in certain financial statements of Proprietary Industries Inc (PPI), misrepresentation through further use of that financial statement information and misrepresentations to [ASC] Staff”. The second alleged “‘Secret Commissions’, ‘Market Manipulation’, failures to file reports of insider trades, and misrepresentations to [ASC] Staff”: Sanctions Decision at para 2.

[32] The conclusions of the Merits Decision are briefly summarized in the Sanctions Decision at para 3:

As discussed below, we found in the Merits Decision that the Individual Respondents bore responsibility for improper financial disclosure and associated misrepresentations by PPI, and for PPI's failure to disclose to the public certain financial benefits received by the Individual Respondents from PPI. Also as elaborated upon below, we found that the Individual Respondents contrived to manipulate the market price of certain shares, which resulted in artificial prices for those shares during two periods in 2000, and that Strategic and Cheshire also bore responsibility for these manipulations. Finally, we concluded that each of the Individual Respondents contravened insider trade reporting requirements and made misrepresentations to Staff.

[33] In the Merits Decision, the ASC Panel made findings in five areas, reproduced in the Sanctions Decision at para 7:

A. Financial Disclosure

We found that PPI's 1998 Financial Statements, 1999 Financial Statements and 2000 Financial Statements – specifically in respect of the reporting of gains attributed to the Newmex, Orion and Azterra Transactions, respectively – were not prepared in accordance with GAAP [generally accepted accounting principles] and thus were contrary to Alberta securities laws. We also found that those financial statements contained misrepresentations.

We further found that in making additional, related inaccurate disclosure in other documents, PPI made further misrepresentations.

The issuance of non-GAAP compliant financial statements, and the making of misrepresentations as described, we found to be conduct contrary to the public interest.

We found that the Individual Respondents each bore responsibility for this improper financial disclosure and the associated misrepresentations. We therefore found that they each contravened Alberta securities laws and acted contrary to the public interest.

B. Undisclosed Financial Benefit

We found that the Individual Respondents each obtained financial benefits, from or through the Four Trading Accounts and the Mandolin Offshore Bank Account, which were funded by commission payments made by PPI on private placements and other transactions. Although this was not in itself necessarily improper, the arrangement was not disclosed as required, and this was contrary to the public interest. We found that the Individual Respondents bore responsibility for this and thereby both acted contrary to the public interest.

C. Market Manipulation

We found that the Individual Respondents, Strategic and Cheshire each bore responsibility for securities trading that resulted, or could reasonably be expected to have resulted in, an artificial price for such securities. Their conduct we found to have been contrary to Alberta securities laws and to the public interest.

D. Insider Trade Reporting

We found that the Individual Respondents contravened the insider trade reporting requirements of Alberta securities laws.

E. Misrepresentations to Staff

We found that the Individual Respondents each made misrepresentations to Staff, so numerous as to constitute a pattern of conduct. We found that, in so doing, they each acted contrary to the public interest.

[34] At no time did the ASC specifically allege that Mr Henning or the other respondents engaged in fraud. Section 93(1) of the *Securities Act* creates a statutory prohibition of fraud, and counsel for the ASC confirmed during the hearing of this appeal that the ASC could have alleged that Mr Hennig breached this provision at the relevant time. Nor were there any proceedings under s 194 of the *Securities Act*, the quasi-criminal provisions.

[35] Ultimately, the ASC Panel imposed various sanctions on Mr Hennig: a ban on serving as director or officer, a ban on buying and selling securities and using exemptions under the *Securities Act*, a \$400,000 administrative penalty and a \$175,000 costs order: Sanctions Decision, paras 262-263. The ASC Panel specifically stated that the administrative penalty was imposed to provide specific and general deterrence (and thereby protect the public), not to punish for past misconduct: Sanctions Decision at paras 135, 159. No order for disgorgement of profits was sought or granted.

VI. Bankruptcy and Insolvency Act, s 178(1) Exceptions

[36] A preliminary observation about what is not included in the exceptions is warranted. There is no specific provision in s 178(1) addressing regulatory bodies. However, elsewhere the *BIA* expressly addresses the status of a regulatory body in the context of an automatic stay of proceedings granted at different stages of the insolvency process (upon filing a notice of intention (s 69), or filing a proposal (s 69.1)).

[37] Section 69.6 of the *BIA* provides that no stay affects a regulatory body's investigation or any proceeding taken in respect of an insolvent person by or before the regulatory body, except for "the enforcement of a payment ordered by the regulatory body or court": s 69.6(2). A regulatory body is defined as a body that has "powers, duties, functions relating to the enforcement or administration of an Act of Parliament or the legislature of a province": s 69.6(1). This clearly includes the ASC. So, this means that a stay under this section would not impede a regulatory body's investigation or hearing that involved an insolvent person, but would affect its ability to collect on any payment it is owed.

[38] The *BIA* further provides that an insolvent person can apply to court to determine whether a regulatory body is actually seeking to enforce its rights as a creditor to determine if it is stayed under s 69.6(4).

[39] Section 69.6 is significant because it explicitly addresses the rights of provincial regulatory bodies and confirms that a regulatory body seeking enforcement of payments it has ordered is acting as a creditor.

[40] Having identified regulatory bodies and discussed their ability to collect payments owed in s 69.6, the absence of such a discussion under s 178(1) is notable. Arguably, if Parliament had intended that there be any exemptions for payments ordered by regulatory bodies under s 178, it would have said so. This supports the conclusion that such a power not be read into enumerated exemptions in s 178(1), and informs the discussion below.

A. Section 178(1)(a)

[41] The chambers judge dealt with s 178(1)(a) in the alternative, but I address it first. The question on appeal is whether the ASC's debt against Mr Hennig comprising the administrative penalty and the costs order survives Mr Hennig's bankruptcy because it is a

fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail.

[42] This broad issue and the sub-topics contained in it are questions of statutory interpretation, reviewable for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para 8.

[43] For the ASC's debt to fall within the exemption in s 178(1)(a): (1) it must be "a fine, penalty or restitution order", or an order similar in nature; (2) it must have been "imposed by a court"; and (3) it must have been imposed "in respect of an offence". In my view, the ASC's debt satisfies none of these requirements.

[44] The chambers judge acknowledged that s 178(1)(a) does not cover every monetary charge imposed by a regulatory authority in the public interest but held that, in the unique circumstances of this case, ASC's debt fell within s 178(1)(a) because:

- the penalty was imposed for what she characterized as reprehensible conduct involving fraud, dishonesty and misrepresentation;
- the certified Merits Decision and Sanctions Decision were filed with the Court of Queen's Bench giving them the same effect as a judgment of that Court;
- the decisions of the ASC were upheld by the Court of Appeal; and
- the ASC responded to the bankruptcy from the beginning with a clearly stated position.

QB Decision at paras 30 and 31.

[45] I agree with the chambers judge that s 178(1)(a) does not exempt debts arising from a regulator's imposition of a monetary penalty in the public interest. However, I disagree that there is anything unique about this case that would alter this conclusion.

[46] Interpretation has to begin with the ordinary meaning of the words used in s 178(1)(a) - "fine, penalty, restitution order" or orders similar to those. Several courts have found that the words "fine" and "penalty" in s 178(1)(a) refer to money penalties imposed as punishment for offences against the public or the state, in criminal or quasi-criminal proceedings: *Air Canada*

Re, 2006 CanLII 42583 at paras 42 & 44, 28 CBR (5th) 317 (ONSC); *Belair v Gottschlich*, 2008 ABQB 47 at para 25; *Chaytor Re*, 2006 BCSC 1742 at paras 38-39; *R v Manzioros*, 2004 MBQB 121 at paras 38, 40; *Buland Empire Development Inc v Quinto Shoes Imports Ltd*, 1999 CanLII 1345 (ONCA) at para 19. I agree that this is the ordinary meaning of these words. While the issue of restitution to the victims of the misconduct of the appellant does not arise in this case, an order providing for restitution or compensation is a penalty or sanction authorized on a prosecution under s 194(6) of the *Securities Act*.

[47] It has been suggested that the main reason why fines and penalties imposed in criminal or quasi-criminal proceedings are exempt from release on a discharge, whereas other debts are not, is that the conduct underlying the criminal fines and penalties is more reprehensible than conduct underlying other debts: *Air Canada* at para 44; respondent's factum at para 126. The chambers judge held this view when she distinguished *Air Canada* based on the underlying conduct.

[48] But that is not necessarily true, and framing the rationale of s 178(1)(a) this way can lead to unproductive debates about whether certain conduct sanctioned by regulatory methods or through civil liability is "just as bad" as the conduct underlying criminal fines or penalties: QB Decision at para 29; respondent's factum at para 126. For an example of this kind of unproductive debate, see *Buland Empire Development Inc* at para 17.

[49] In fact, the main rationale for exempting criminal fines or penalties is respecting the division of labour (and authority) within the legal system. This is what Master Funduk meant when he called s 178(1)(a) an "administration of justice concept": *Jerrard v Peacock* at para 42. Exempting criminal fines and penalties from the ordinary operation of bankruptcy proceedings is justified because "as a matter of principle, criminal courts should not be subjected to the control of the civil courts": *R v Fitzgibbon*, [1990] 1 SCR 1005 at 1117-1118. 75 OR (3d) 673. This section helps maintain the balance between criminal monetary sanctions and the objectives of bankruptcy law. It reflects a policy choice that those subjected to criminal sanction should not be allowed to escape the burden of that sanction through bankruptcy proceedings. It has long been established that courts should avoid generating "the sort of clash between civil and criminal law that is apt to bring the law into disrepute": *British Columbia v Zastowny* 2008 SCC 4 at para 25.

[50] There are two further reasons why the administrative penalty and costs order imposed by the ASC is not a "penalty", a "fine" or "similar in nature to a penalty or fine" for the purpose of s 178(1)(a). First, the administrative penalty is neither remedial nor punitive, but preventative: *Cartaway Resources Corp (Re)*, 2004 SCC 26 at paras 55, 60. Second, the ASC filed its Merits Decision and its Sanctions Decision at the Court of Queen's Bench making it enforceable as if it were a judgment of that Court: s 200(1). However, s 200(2) specifically states "the administrative penalty in the amount specified in the decision may be collected as a judgment of the Court of Queen's Bench for recovery of debt" (emphasis added). When the ASC filed the decisions at the Court, the *Securities Act* characterized them as a debt for enforcement purposes, and the ordinary civil enforcement mechanisms became available. Based on ordinary statutory interpretation of s 200(2) of the *Securities Act*, the ASC's debt is neither a penalty or a fine, nor is it similar in nature to them.

[51] So, to conclude, “fines”, “penalties” and orders similar to them refer to money penalties imposed as punishment for offences against the public or the state in criminal or quasi-criminal proceedings. The ASC did not impose the administrative penalty and the costs order to punish Mr Hennig but to prevent future misconduct, nor did it impose them in criminal or quasi-criminal proceedings. The ASC and the chambers judge characterized Mr Hennig’s conduct as morally reprehensible, and I do not disagree. The ASC could have referred the matter to the Crown to lay charges against Mr Hennig for the offence of contravening securities laws under s 194 of the *Securities Act* – a quasi-criminal proceeding – but it chose not to. Instead, it chose the regulatory path.

[52] Further, as noted, s 178(1)(a) only applies to fines or penalties “imposed by a court in respect of an offence”. Section 2 of the *BIA* defines “court” for most purposes as the superior courts of the Provinces but that definition does not apply to s 178(1). “Court” as it appears in s 178(1) is undefined. The ASC argues that the administrative penalty and costs order were “imposed by a court” because it filed the Merits Decision and the Sanctions Decision with the Court of Queen’s Bench with the result that they have “the same force and effect as if [they] were a judgement” of the court: s 200(2) of the *Securities Act*. I disagree. When the ASC filed the Decisions with the Court of Queen’s Bench, the Court did not take any action apart from putting them on file. Rather, the act of filing enabled the ASC to use civil enforcement methods to enforce the Decisions that it (not the Court of Queen’s Bench) had already made. The involvement of the Court of Queen’s Bench was passive – by accepting a filing, a string of collection possibilities opened up to the ASC. Giving the word “impose” its ordinary meaning is consistent with the interpretive approach to s 178(1) urged in these reasons.

[53] Nor does the dismissal of Mr Hennig’s appeals of the Merits Decision and the Sanctions Decision to this Court bolster the ASC’s argument. The dismissal of the appeals confirmed that Mr Hennig owed a debt to the ASC comprising the administrative penalty and the costs order. It does not mean that this Court “imposed” them. Rather, it upheld the ASC’s decision to do so.

[54] The final issue is the meaning of the word “offence” in s 178(1)(a) of the *BIA*. The word can be used broadly to mean a “breach of the law”, but in its ordinary meaning, it refers to a breach of the criminal or quasi-criminal law. This is consistent with the analysis above regarding the meaning of fines and penalties. See also Houlden, Morawetz & Sarra at H§63(2).

[55] In summary, I agree with the chambers judge’s assessment that, as a general proposition, administrative penalties and costs orders imposed by the ASC do not come within s 178(1)(a) of the *BIA*. However, I disagree with the chambers judge that the unique characteristics of this case somehow bring it within s 178(1)(a)’s ambit.

B. Section 178(1)(e)

[56] For ease of reference, s 178(1)(e) is repeated:

any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim.

[57] In *McAteer v Billes*, 2007 ABCA 137 at para 16, this Court identified three elements s 178(1)(e): a fraudulent misrepresentation or false pretences, a link between the debt and the fraud, and a passing of property as a result of the fraud. Before addressing these elements, a preliminary comment about terminology is necessary.

[58] It is sometimes said that fraudulent misrepresentation is significantly different from false pretences. Fraudulent misrepresentation is usually identified with the tort of deceit, and the elements of that tort are set out in cases like *Derry v Peak* (1889) 14 App Cas 337 (UKHL) and *The Toronto-Dominion Bank v Merenick*, 2007 BCSC 1261 at para 30. The elements are: (1) a representation (2) that was false (3) made knowingly, without belief in its truth or recklessly indifferent to whether it was true or false (4) the creditor relied on the representation to his detriment. False pretence, as defined in s 361(1) of the *Criminal Code*, does not require detrimental reliance. Nevertheless, the language of s 178(1)(e) requires a transfer of property as a result of the fraudulent misrepresentation or false pretences, and often this will mean that there is no practical difference between a fraudulent misrepresentation and a false pretence under s 178(1)(e). While the section requires only one of false pretence or fraudulent misrepresentation, practically it does not matter which is engaged in this case. For the sake of simplicity in what follows, I will use “fraudulent statement” to refer to both “false misrepresentation” and “false pretence”.

[59] As noted, the ASC is a creditor. Mr Hennig owes the corresponding debt, and it is not a debt that arises from an equity claim. Therefore, the issues relating to s 178(1)(e) are as follows:

- Did Mr Hennig make fraudulent statements for the purpose of s 178(1)(e)?
- What kind of link is required between the debt and the fraud? Is that link made out in this case?
- Given that property must be transferred as a result of the fraudulent statement, must it be transferred by the creditor relying on s 178(1)(e)? Was there a relevant transfer here?

These reasons address the first two elements and conclude that the ASC has not satisfied either.

[60] For the most part, these issues raise questions of interpretation, reviewable for correctness: *Housen* at para 8. Issues about what the parties to this appeal did are questions of fact, reviewed on a standard of palpable and overriding error.

i. Did Mr Hennig make fraudulent statements?

[61] A preliminary point about process is warranted. For a creditor to obtain the benefit of an exemption in s 178(1), there must be a judicial determination made under the *BIA* that the debtor

comes within one of the enumerated exceptions. This might occur on application for discharge, or as here, an entirely separate application.

[62] With respect to s 178(1)(e) specifically, if there is a prior judicial finding of fraud in underlying litigation related to the debt then the task for the application judge under the *BIA* will likely be straightforward. If it is not clear what a court determined in the prior judicial proceedings, courts in Alberta and elsewhere have long recognized that the application judge can look to the judgment recognizing the debt (if any), the pleadings and context to determine if there were fraudulent statements for the purpose of 178(1)(e). The early cases adopted this approach when it was not clear from the record whether a debtor had made fraudulent statements. In *Morgan v Demers*, 1986 ABCA 100, all this Court had to go on was the formal judgment. There were no written reasons and no transcript of the oral reasons. So, this Court assessed the preamble of the formal judgment, which referred to an affidavit and questioning on the affidavit, to determine if there had been an admission of fraudulent misrepresentation for the purpose of s 178(1)(e). Similarly, in *Berthold v McLellan*, 1994 ABCA 122, this Court had to look to pleadings and evidence to make sense of a brief bench judgment to decide whether the judgment debt fell within s 178(1)(d); see also *Covey (Re)*, 2012 ABQB 565 at para 11; *HY Louie Co Limited v Bowick*, 2015 BCCA 256 at paras 57, 60-61, 88.

[63] In the case of a debt resulting from a finding by an administrative tribunal, even if there is a finding of fraudulent statements, an application judge must make his or her own determination based on a review of the record whether the debt falls within the exemption: *Canada (Attorney General) v Bourassa (Trustees of)*, 2002 ABCA 205 at paras 5-9.

[64] So, what are the factors an application judge should consider? A starting point is the pleadings. Some cases have held that the failure to allege fraud in the pleadings may not be fatal to an application for a declaration that a debt falls under s 178(1)(e) – such as when the fraudulent statements might not have come to light until pre-trial proceedings. I don't disagree. The pleadings on their own may not be determinative, depending on how the proceedings evolve. Other important factors relate to the overall context of the proceedings, including:

- the sophistication of the parties;
- nature of the body making the determination;
- the nature of the proceedings, for instance whether they were summary or fulsome;
- whether fraudulent statements could have been raised in the proceedings;
- if allegations of fraudulent statements were raised, whether they were abandoned or dismissed;
- the evidence and the reasons for decision.

[65] An application judge under s 178(1) must make his or her own determination considering the types of factors listed above, keeping in mind the purpose of s 178.

[66] In this case, Mr Hennig was charged with conduct contrary to the public interest and/or breach of Alberta securities laws, but the two Notices of Hearing did not allege fraud.

[67] The ASC Panel made no findings of fraud by Mr Hennig in the Merits Decision or the Sanctions Decision. The ASC's summary of findings in the Merits Decision (see para 3 above) does not mention "fraud". In fact, the only reference to fraud appears in para 742 of the Merits Decision which generally describes the power of the ASC:

The Commission has a broad public interest authority, which it must exercise in furtherance of its overarching mandate to protect investors from unfair, improper or *fraudulent* practices, and to foster a fair and efficient capital market and investor confidence in that market. The purpose of a hearing under sections 198 and 199 of the Act is to determine, if allegations of misconduct are proved, whether the public interest warrants the issuance of any protective or preventative sanctions. (emphasis added).

[68] The chambers judge concluded that the ASC Panel made findings of fact against Mr Hennig that would fall within the definition of false pretences or fraudulent misrepresentation in s 178(1)(e). Although she did not identify precise parts of the Merits Decision, it seems that she had in mind findings such as paras 722-730, where the ASC Panel found that Mr Hennig was responsible for PPI's "woefully inadequate" and "misleading" financial disclosure and financial statements between 1998 and 2000 in relation to three apparent share sale transactions by PPI. Mr Hennig knew that the financial statements misrepresented PPI's financial position: Merits Decision at para 695. His conduct with respect to the financial statements is described as "deceptive and despicable" done to enable PPI to report non-existent gains. The ASC Panel also found that Mr Hennig concealed the fact that he derived benefits from commissions paid by PPI on the transactions and "lied" to ASC staff who were investigating wrongdoing.

[69] The problem is that the chambers judge only considered the fact findings made by the ASC Panel. Further consideration of the context of the proceedings was necessary before concluding that Mr Hennig made fraudulent statements for the purpose of s 178(1)(e).

[70] The chambers judge did not consider the pleadings, that the ASC made no allegation of fraud. There is no explanation for this on the record. The ASC acknowledged during the oral hearing of this appeal that at the relevant time, it had the ability to allege fraud against Mr Hennig but chose not to do so. It is also clear that the ASC is prepared to allege fraud where it thinks it is appropriate: *Alberta Securities Commission v Brost*, 2008 ABCA 326. As this Court noted in *Bourassa* at para 9, "[f]raud and its proof have their own distinct biosphere. In commercial disputes, allegations of fraud are frequently levelled. But they must be levelled with caution. ... Th[e] sanctions reflect the gravity with which the courts regard an allegation of fraud. Its existence will not be judicially noticed". The choice of the ASC is relevant.

[71] The ASC is a sophisticated regulatory body that operates with the assistance of in-house legal counsel, and conducts many complex hearings. This case lasted 38 hearing days and involved 24 witnesses. The Merits Decision was 1312 paragraphs long. When the pleadings, allegations, evidence and findings are considered, the fact that the ASC did not charge Mr Hennig with fraud, and the ASC Panel made no express findings of fraud against him should have also been considered. Almost two decades after the impugned conduct the ASC is claiming Mr Hennig made fraudulent statements, when it never chose to do so before. This is not a case involving an unclear or confusing record.

[72] In my view these factors weigh against finding that the first part of the test has been met. This conclusion is strengthened when it is recalled that debts imposed by provincial regulatory bodies are not specifically identified in s 178(1). As such, the ASC cannot bring itself within the first element of s 178(1)(e) and does not get the benefit of the exemption.

[73] In conclusion, the chambers judge erred by not considering the full context of the proceedings before concluding that the findings of fact made by the ASC Panel amounted to Mr Hennig making fraudulent statements for the purposes of s 178(1)(e).

ii. What kind of link is required between the debt and the fraudulent behaviour? Is that link made out in this case?

[74] In addition, the ASC cannot meet the second element of s 178(1)(e) as articulated in *McAteer* at para 16: there must be a “link” between the debt or liability and the fraudulent statement. The need for a link is explicit in the language of s 178(1)(e), which refers to “any debt ... resulting from obtaining property ... by false pretences or false misrepresentations”.⁴

[75] For ease of exposition, and contrary to the finding in the section above, the following section assumes that the first requirement of s 178(1)(e) was met and Mr Hennig did indeed make fraudulent statements.

[76] “Link” is obviously a vague term. What kind of link between the debt and the fraudulent statement is required? The ASC argues that this requirement is minimal. It is made out if there is a causal link between the debt and the fraudulent statement. If the debt would not have existed if the fraudulent statements had not been made, that is enough. The ASC would not have imposed a fine and awarded costs against Mr Hennig but for his conduct. The chambers judge held that this type of link is sufficient for the purpose of s 178(1)(e): QB Decision at para 64. This can be described as a factual link.

[77] Mr Hennig submits that a debt is sufficiently linked to the fraudulent statements only if the debtor made the fraudulent statements to the creditor who is invoking s 178(1)(e) to keep the debt alive. Most of Mr Hennig’s fraudulent conduct consisted of him causing PPI to issue misleading

⁴ When *McAteer* was decided, a slightly different version of s 178(1)(e) was in force but the difference is not relevant here.

financial statements and disclosure and failing to disclose that he was receiving commissions on PPI transaction. The statements were not directed *at the* ASC, but potential investors and existing shareholders. Therefore, Mr Hennig argues that the required link between the fraudulent statements and the debt is not made out. However, the ASC Panel also found that Mr Hennig lied to ASC staff during their investigation.

[78] For the reasons given below, I find that a factual link is not enough, although it is necessary. The required link between the fraudulent statement and the debt is established only if the debtor makes the fraudulent statement to the creditor relying on s 178(1)(e). The rest of this section justifies this requirement and addresses whether it was met by Mr Hennig's fraudulent statements to ASC staff.

a. Must the debtor make the fraudulent statements to the creditor who is invoking s 178(1)(e)?

[79] In my view, there are three reasons why s 178(1)(e) only applies if the debtor makes fraudulent statements to the creditor who invokes that section.

[80] First, as noted above, s 178(1) in general and s 178(1)(e) in particular, set out exceptions to the principle that debtors should be given a fresh start when discharged from bankruptcy. Because s 178(1)(e) is an exception to the general rule, it should be interpreted and applied only in clear cases. Such an interpretation limits the incidence of exemptions from release upon a discharge under s 178(1), furthering the goal of financial rehabilitation of the bankrupt, and is more in tune with the intention of Parliament.

[81] Second, a principal justification for exempting debts under s 178(1)(e) from release on a discharge is that debtors who have engaged in fraud do not deserve the "reward" of release when the bankruptcy process is over. But deservingness goes both ways. Does the creditor whose judgment survives bankruptcy deserve that outcome, compared with the creditors whose judgments are released: *Jerrard v Peacock* at para 47? Why this creditor but not that one? Invoking the principle about not rewarding fraudulent debtors is only part of the story. A creditor should fall within s 178(1)(e) only if he or she has been directly *victimized* by the fraudulent behaviour of the debtor. In other words, the fraudulent statements must have been directed at the creditor. The fact that the creditor is owed a debt that is factually linked to the debtor's fraudulent conduct is not enough.

[82] Third, the view that s 178(1)(e) only applies when the debtor has defrauded the creditor is consistent with the decided cases.

[83] The closest and most on point is *Goldstein (Re)*, 2011 ONSC 561. Goldstein, a lawyer, obtained mortgage funds under false pretences. As a result, the Law Society of Upper Canada revoked his licence to practice law and ordered him to pay costs of \$60,000. Goldstein assigned himself into bankruptcy, and the Law Society of Upper Canada sought to exempt its costs order from release under either s 178(1)(d) or (e). Justice Morawetz, as he then was, held that the costs

order was not based on fraud by Goldstein; it arose out of disciplinary hearings. The debt did not arise from a fraud committed by Goldstein against the Law Society of Canada (para 10). The costs award was not sufficiently linked to fraud by Goldstein, and as a result, the debt did not fall into ss 178(1)(d) or (e).

[84] The same analysis was used in *Kurtz (Re)*, [2002] OJ 2151, 35 CBR (4th) 273 (SC), which held that a debt did not survive bankruptcy when the debtor did not make a fraudulent misrepresentation to the creditor. The creditor company had installed an air conditioning system at a home previously owned by the bankrupt. The bankrupt sold the air conditioning unit when he sold the house and, at the same time, stopped making lease payments. The company alleged that the bankrupt had fraudulently misrepresented to the purchasers of his home (not to the company) that he owned the air conditioner system and had the right to sell it. The court found that the creditor's claim did not survive because it was not the addressee of the fraudulent misrepresentation. At most, the creditor had a claim in conversion.

[85] The necessity for the debtor to have defrauded the creditor has also been recognized in other contexts. *Korea Data Systems* dealt with s 178(1)(d), but it supports the interpretation of s 178(1)(e) under discussion. *Korea Data Systems* sued Mr Chiang. The California court found that Mr Chiang did not owe a fiduciary duty to *Korea Data Systems*, but he did owe one to a third party, and it was by breaching that duty that he defrauded *Korea Data Systems*. Mr Chiang filed for bankruptcy in Ontario, and *Korea Data Systems* sought a declaration that the California judgment debt would survive his discharge under s 178(1)(d). The Ontario Court of Appeal held that s 178(1)(d) did not apply because Mr Chiang had not breached a fiduciary duty to *Korea Data Systems*. Although the language of s 178(1)(d) says only that there must be a breach of fiduciary duty and does not specify to whom that duty is owed, the Ontario Court of Appeal interpreted s 178(1)(d) requiring the bankrupt to breach a fiduciary duty owed to the creditor. The core of its reasoning was as follows (at para 64):

[A] bankrupt's wrongdoing or improper conduct is not itself sufficient to bring a debt within the ambit of the section. Rather, the impugned conduct must relate to the fiduciary relationship itself. In other words, it is the relationship between the claiming creditor and the bankrupt, as well as the nature of the bankrupt's conduct, that anchors s. 178(1)(d). The provision protects a creditor that was in a vulnerable position in relation to the bankrupt when its claim arose.

[86] The analogy between the interpretation of s 178(1)(d) adopted in *Korea Data Systems* and the interpretation of s 178(1)(e) offered here is obvious. Section 178(1)(e) does not say to whom the fraudulent statements must be made. If a fraudulent statement that results in a debt is sufficient to bring the debt within the ambit of s 178(1)(e), then it is only the bankrupt's improper statements, not the relationship between the creditor and the bankrupt, that engages the subsection. Section 178(1)(e) protects creditors who are vulnerable in the sense that they were the *target* of the debtor's fraudulent statements, much like s 178(1)(d) protects creditors who are vulnerable to breaches of fiduciary duty.

[87] In this appeal, the ASC argues that two decisions are inconsistent with the interpretation of s 178(1)(e) suggested above, and support the conclusion that a factual link between the fraudulent statement and the debt is sufficient.

[88] One case is *Woolf v Harrop* (2003), 50 CBR (4th) 309, [2003] OJ No 5215 (CJ), where the creditor bank applied for a declaration that its judgment debt against the bankrupt Harrop was not released by an order of discharge. The bank was the assignee of a mortgage that Harrop had originally granted to another company, the original mortgagee. When Harrop entered into the mortgage, he told the original mortgagee he did not owe any income tax arrears. That was false and Harrop knew it was false. After the original mortgagee assigned the mortgage to the bank, Harrop defaulted and the bank obtained a default judgment against him for the outstanding sum. When Harrop made an assignment into bankruptcy, the bank sought a declaration that its default judgment survived a discharge under s 178(1)(e) because Harrop fraudulently misrepresented his income tax situation to the original mortgagee. A question arose whether the bank could rely on s 178(1)(e), given that Harrop had made the fraudulent misrepresentation to the original mortgagee. The court found that it could, holding that the assignment of the mortgage transferred all of the legal rights and entitlements of the original mortgagee to the bank – including the right to sue Harrop for his fraudulent misrepresentation to the original mortgagee. The bank's entitlement to the relief under s 178(1)(e) was no different than the entitlement of the original mortgagee would have been in the absence of the transfer of the mortgage.

[89] There is no denying that the bankrupt in *Woolf v Harrop* did not, in fact, make his fraudulent statements to the creditor bank that relied on s 178(1)(e). One interpretation of the decision is that, as a matter of law, the creditor bank was treated as if it was the victim of the fraudulent misrepresentation because the original mortgagee assigned all its rights to the bank, including its right to sue for fraudulent misrepresentation. This interpretation is consistent with the approach taken in these reasons. Another interpretation is that *Woolf v Harrop* creates a small exception to the rule that s 178(1)(e) applies only if the debtor has made fraudulent statements to the creditor – namely where the creditor has received a full assignment of rights from the person to whom the fraudulent statement was originally addressed. Neither interpretation supports the ASC's position in the appeal.

[90] The ASC also argues that *Ste Rose & District Cattle Feeders Co-op v Geisel*, 2010 MBCA 52 supports its position about the kind of link required between the fraud and the debt. A cattle producer's co-op existed to guarantee loans taken by its members to purchase cattle. The co-op guaranteed \$75,000 in loans to enable Geisel to buy cattle. The agreement between Geisel and the co-op included a term that ownership of the cattle would remain in the co-op until the cattle were sold. On the strength of the co-op's guarantee, the bank lent \$75,000 and Geisel bought 126 cattle. The following year, Geisel's son purported to sell the cattle and received the purchase price into his own account. His bank seized the funds. Then Geisel defaulted on the loan repayments, and the co-op was called on to honour its guarantee. The co-op obtained a default judgment against Geisel and his son, following which both filed assignments into bankruptcy. Each was discharged, and a short time later, the co-op applied for a declaration that its judgments were not released by the discharges, relying on s 178(1)(e), among others.

[91] On appeal, one issue was whether the default judgment against the son fell within s 178(1)(e). The son had falsely represented *to the auction house* that he owned the cattle and that he was entitled to the sale proceeds. But he had not made any false statements to the co-op. The Manitoba Court of Appeal found that although the son had no dealings with the co-op, he nevertheless obtained the cattle proceeds (which should have gone to the co-op) because of his fraudulent statements and that the default judgment was based on that fraud: para 106. That was sufficient to bring the judgment debt within s 178(1)(e). The Court justified this result on the footing that the son acted dishonestly, and the purpose of s 178(1)(e) is to ensure that dishonest debtors do not benefit from their dishonesty.

[92] I decline to follow *Ste Rose* for the reasons already explained above – the exemptions in s 178(1) should be interpreted narrowly, and creditors deserve the preferential treatment given by s 178(1)(e) only if they are the victims of the debtor’s fraudulent behaviour.

[93] To conclude, the proper interpretive approach to s 178(1)(e), the policy underlying it and the bulk of the decided cases support the view that the debt is sufficiently linked to the fraud only if the debtor made the fraudulent statements to the creditor who is relying on s 178(1)(e). A regulatory body imposing an administrative penalty for conduct contrary to the public interest will rarely be able to establish such a link, as typically it only becomes involved *after* the impugned conduct has already occurred.

b. Do Mr Hennig’s lies to the ASC staff during the investigation satisfy the requirement of a link between the debt and the fraudulent statements?

[94] The Merits Decision deals at length with Mr Hennig’s involvement in PPI’s issuance of misleading financial statements for the years 1998-2000. These statements were made to existing or potential investors, not to the ASC. It also addresses Mr Hennig’s receipt of undisclosed financial benefits from PPI for his services in making private placements of PPI shares and other transactions. Insofar as Mr Hennig’s failure to disclose the benefits constitutes a fraudulent misrepresentation or a false pretence, it was addressed to shareholders (to whom the disclosure should have been made), not the ASC.

[95] Twenty-three paragraphs of the 1381-paragraph Merits Decision address allegations that Mr Hennig and others made misrepresentations to ASC staff during the ASC investigation, including by concealing information and lying. Specifically, the ASC alleged that Mr Hennig made false statements to staff during discussion about PPI’s release of financial disclosure for the Newmex, Orion and Azterra transactions. One paragraph of the Merits Decision addresses the evidence, and one paragraph expresses the ASC Panel’s finding: “the Individual Respondents repeatedly lied to staff”. The reasons in the Sanction Decision for setting the administrative penalty at \$400,000 do not mention the misrepresentations to the ASC: Sanctions Decision at paras 177-180, 196.

[96] In my view, the fact that Henning lied to ASC staff does not establish the required link between the fraudulent statements and the ASC’s debt. Reading the ASC Panel’s decisions

realistically, the ASC's debt against Mr Hennig is not *based* on Mr Hennig's lies to ASC staff. It is based on Mr Hennig's misleading statements in the capital markets and other market wrongdoing.

iii. Who must transfer property as a result of the fraudulent statement? Was there a relevant transfer here?

[97] The final element of s 178(1)(e) relates to the transfer of property. It is clear from the language of s 178(1)(e) that the debt must result from "obtaining property" by false pretences or fraudulent misrepresentation. Someone must obtain property due to the fraudulent statements, but the section does not say who. In *McAteer*, this Court held that the language does not require the debtor who made the fraudulent statements to have obtained property as a result but otherwise left the issue open; nor did the Court limit who the transferor must be.

[98] Mr Hennig argues first that s 178(1)(e) requires the creditor invoking s 178(1)(e) to have transferred property as a result of⁵ the fraudulent misrepresentation or false pretence. Alternatively, even if s 178(1)(e) requires only that property be transferred by or to *someone* as a result of the fraudulent statements, there was no evidence or findings that property was transferred in this case.

[99] It is unnecessary to address this issue because the conclusions to this point establish neither 178(1)(a) nor (e) apply to the ASC's debt. Since the parties' oral and written submissions did not cover this topic in detail, the wiser course is to leave its determination to another appeal where it would make a difference to the outcome.

VII. Conclusion

[100] The ASC argued that a potential negative impact of allowing the appeal would be to undermine the deterrent effect of an administrative penalty imposed on those who breach securities law. If the penalty does not survive bankruptcy, Mr Hennig, or anyone in his position, need only declare bankruptcy to avoid the consequences of their bad conduct. There are two responses to this concern.

[101] First, the ASC has many remedial options available to it under the *Securities Act*, and as in this case, the administrative penalty was only one of the sanctions imposed. The other non-monetary sanctions survive bankruptcy. There is a permanent ban on Mr Hennig serving as a director and/or officer of any issuer, and a 20-year cease trading in or purchasing any securities or exchange contracts and denial of using any exemption order.

[102] Second, finding that a bankrupt debtor contravened securities legislation and acted contrary to the public interest usually entails morally bad conduct by the debtor. And as has been discussed above, alone that is not enough to bring the debt within s 178(1)(e). It seems that what the ASC is

⁵ The difference, if any, between "in reliance on" (which is used in the traditional formulation of the tort of deceit) and "resulting from" (in the statutory formulation) is not material in this case.

seeking is a general exemption from release upon discharge for the administrative penalties imposed by a securities regulator. This would create a new category of exemption under s 178(1) which falls within the purview of Parliament, not this Court.

[103] The ASC’s debt is neither “a fine, penalty, restitution order or other order similar in nature ... imposed by a court in respect of an offence” (s 178(1)(a)) nor a “debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation” (s 178(1)(e)). Accordingly, it was released when Mr Hennig was discharged from bankruptcy.

VIII. Disposition

[104] The appeal is allowed. A declaration shall issue that ASC’s debt does not survive Mr Hennig’s bankruptcy and is released by the order of discharge.

Appeal heard on May 7, 2021

Reasons filed at Calgary, Alberta
this 14th day of December, 2021

I concur:

Watson J.A.

Khullar J.A.

Appendix A

Bankruptcy and Insolvency Act:

178(1) An order of discharge does not release the bankrupt from

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

(a.1) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting therefrom;

(b) any debt or liability for alimony or alimentary pension;

(c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;

(g) any debt or obligation in respect of a loan made under the Canada Student Loans Act, the Canada Student Financial Assistance Act or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or

(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student;

(g.1) any debt or obligation in respect of a loan made under the Apprentice Loans Act where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased, under that Act, to be an eligible apprentice within the meaning of that Act, or

(ii) within seven years after the date on which the bankrupt ceased to be an eligible apprentice; or

(h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).

Court may order non-application of subsection (1)

(1.1) At any time after five years after the day on which a bankrupt who has a debt referred to in paragraph (1)(g) or (g.1) ceases to be a full- or part-time student or an eligible apprentice, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

Claims released

178(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

Pentelechuk J.A. (concurring in the result):

[105] I have had the benefit of reading the decision of my colleagues. I endorse their thorough analysis of why the Alberta Securities Commission's (ASC) claim does not survive under section 178(1)(a) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[106] I also agree with my colleagues' ultimate conclusion that the ASC's claim does not survive under section 178(1)(e) and that the appeal must be allowed. Given that the exceptions listed in s 178 are to be interpreted narrowly, it is evident that administrative penalties and costs enforced by the ASC are not debts or liabilities *resulting from* Mr Hennig's fraud. The ASC was not enforcing the penalty and costs on behalf of defrauded victims. Nor does the judgment debt represent damages or compensation for losses caused by Mr Hennig's fraud. The ASC concedes there is no direct evidence of harm to investors. The ASC was not, itself, a "victim" of the fraud.

[107] However, I am unable to agree that the ASC failed to satisfy the first part of the test; that is, that it failed to establish that Mr Hennig engaged in fraudulent conduct and that the chambers judge erred in so concluding.

[108] To determine whether section 178 of the *BIA* applies, the Court (whether through bankruptcy proceedings or a separate civil application) must characterize the judgment below. It is entitled to do so based on the pleadings and the proceedings that resulted in the judgment. Regardless of the route taken, a creditor must obtain a court declaration that a debt survives bankruptcy: *Canada (Attorney General) v Bourassa (Trustee of)*, 2002 ABCA 205 at para 5; *Shaver-Kudell Manufacturing Inc v Knight Manufacturing Inc*, 2021 ONCA 202 at para 28.

[109] An assessment of whether the evidentiary record can support a finding of fraudulent misrepresentation or false pretences attracts a deferential standard: *Housen v Nikolaisen*, 2002 SCC 33 at para 36; *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2017 ABCA 378 at para 63; *McAteer v Billes*, 2007 ABCA 137 at para 14. In my view, no palpable and overriding error has been demonstrated in the chambers judge's assessment of the facts as found by the ASC, her application of the law to those facts, or her conclusion that "the essence of the misconduct that gave rise to the administrative penalty was fraud": at para 44.

[110] The chambers judge correctly set out the four elements of the test for civil fraud, which encompasses fraudulent misrepresentation:

- i. a representation was made;
- ii. the representation was false;
- iii. the representation was made knowingly, without belief in, or with indifference to its truth; and
- iv. the representation was relied on by the creditor: at para 37.

[111] In defining false pretences, she referred to section 361(1) of the *Criminal Code* as:

a representation of a matter of fact, either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made by a fraudulent intent: at para 40.

[112] Houlden, Morawetz & Sarra, *Bankruptcy and Insolvency Law of Canada* [Houlden & Morawetz] suggest that false pretences and fraudulent misrepresentation are “almost identical”: 4th ed (Toronto: Thomson Reuters Canada, 2009) (update October 2021) at §7:204 (online). The essence of each is deceit, whether the deceit is by a positive act or by failing to disclose material facts: *The Toronto-Dominion Bank v Merenick*, 2007 BCSC 1261 at para 29; *Iroquois Falls Community Credit Union Ltd v Claude Miljours*, [2009] OJ No 165 at para 18, 52 CBR (5th) 231.

[113] As neatly summarized by Master Funduk in *Re Nagy (Bankrupt)*, 2003 ABQB 74 at para 17: “Fraud may consist as well in the suppression of what is true as in the representation of what is false”: at para 17. Most assuredly, fraud can encompass blameworthy or cunning or strategic silence: *Houlden & Morawetz* at §7:204.

[114] As noted by the chambers judge, the ASC Panel made the following findings regarding Mr Hennig’s conduct:

- a) that he had been responsible for improper financial disclosure and misrepresentations in the 1998, 1999, and 2000 financial statements of Proprietary Industries Inc. (PPI) and other corporations with which he was involved and related misrepresentations in other PPI disclosure in order to produce a misleading impression of financial positions and results, contrary to Securities Laws;
- b) obtained financial benefits from investor funds that were not disclosed to investors as required;
- c) participated in market manipulation that resulted, or could reasonably be expected to have resulted, in an artificial price for certain securities; and
- d) contravened the insider trading reporting requirements of Alberta Securities Laws.

[115] The ASC Panel described Mr Hennig’s actions as “deceptive and dishonourable” and determined that he was guilty of “deception, concealment and manipulation”. These factual findings are sufficient to satisfy the essential elements of civil fraud; Mr Hennig made fraudulent misrepresentations to investors by misrepresenting PPI’s financial position and results and by failing to disclose commissions he had taken, knowing the information was misleading and inaccurate.

[116] My colleagues suggest the chambers judge erred in considering only the fact findings made by the ASC and that “further consideration of the context of the proceedings was necessary before concluding that Mr Hennig made fraudulent statements for the purpose of s 178(1)(e)”: at para 69. More specifically, they highlight that the chambers judge did not consider the pleadings and in particular, that the ASC did not allege fraud against Mr Hennig despite having the option to do so.

[117] If the ASC had specifically pleaded fraud or if the ASC Panel had made express findings of fraud, the chambers judge’s task would have been a straightforward exercise. But it does not follow that the failure to plead fraud factors so significantly in the analysis. “In appropriate circumstances, pleadings can inform the interpretation of what has been determined or admitted to create the debt or liability, but they are not necessarily sufficient or determinative”: *Johansen v Wallgren*, 2021 ABCA 234 at para 21.

[118] The substantive question is whether the findings below fall within the scope of s 178. As an example, this Court in *Berthold v McLellan*, 1994 ABCA 122 had no difficulty concluding the judgment fell within the scope of s 178(1)(d), despite neither the pleadings specifying nor the trial judge expressly finding that the bankrupt was acting “in a fiduciary capacity”.

[119] Civil actions or proceedings by administrative bodies are not pleaded in anticipation of a defendant filing for bankruptcy. It is entirely conceivable that evidence may arise in a proceeding that supports certain findings that in turn fall within the scope of s 178. That is the case here. This was a lengthy hearing spanning 38 days. Mr Hennig was not an “honest but unfortunate bankrupt” who should enjoy the benefit of an artificially circumscribed approach in determining whether his actions constituted fraud for the purpose of s 178(1)(e). That the ASC is a sophisticated body does not alter this central policy consideration.

[120] Despite my conclusion that it was within the chambers judge’s purview to find fraud on the part of Mr Hennig and that she made no error in so finding on the record, the appeal must be allowed for the reasons noted.

Appeal heard on May 7, 2021

Memorandum filed at Calgary, Alberta
this 14th day of December, 2021

Pentelchuk J.A.

Appearances:

E.A. Viala
for the Respondent

J. Groia
K. Richard (no appearance)
for the Appellant

TAB 7

[IN THE APPEAL DIVISION.]

THE KING v. McMANUS.

1924

November 23

*False Pretences — Inducement to Part With Possession of Goods
— Retaining Right of Property — What Constitutes Offence.*

Where a party is induced by false representation to part with the possession of goods, but does not part with his right of property therein, there can be no conviction for obtaining the goods under false pretences.

Criminal Law — Conviction for Obtaining Goods by False Pretences — Facts Justifying a Verdict for Attempt Only — Court of Appeal — Cr. Code, S. 1016 (2) — Can Now Substitute Verdict of Attempt, in Lieu of Verdict Found.

Where, however, a party has been convicted of obtaining goods by false pretences upon indictment, and on that indictment the jury could have found him guilty of some other offence, *e. g.*, the offence of attempting to obtain goods by false pretences, and it clearly appears by the jury's finding that they must have been satisfied of facts which proved him guilty of attempting to obtain goods by false pretences, a Court of Appeal may now, under sec. 1016 (2) of the Criminal Code, as enacted by 1923 (Can.) c. 41, sec. 9, on an appeal from such conviction, instead of allowing or dismissing the appeal, substitute for the verdict found, a verdict of guilty of attempting to obtain goods by false pretences.

This is an appeal by the defendant from a conviction against him of obtaining goods by false pretences.

1923. September 12. *D. Mullin, K.C.*, to support appeal. To support a charge of obtaining goods by false pretences, there must be evidence that the owner parted with his property — not merely with the possession of it: *Tremear Cr. Code*, 1919 ed. p. 498, s. 405; *Rex v. Nowe* (1904) 8 Can.

1923
 THE KING
 v.
 McMANUS

C. C. 441, 36 N. S. R. 531; *Reg. v. Corey* (1883) 22 N. B. R. 548; *Reg. v. Killam* (1870) L. R. 1 Cr. Cases 211; *Crankshaw*, 1915, p. 401 and cases cited. *Rex v. Illsley* (1917) 29 Can. C. C., 105, is distinguishable from the present case. In that case the owner consented to the property and possession passing. In the present case the informant swears positively he was not parting with the property. See also *Queen v. Middleton* (1873) L. R. 2 C. C. R. 38.

Hon. J. P. Byrne, K.C., Attorney-General, for the Crown, contra: There was the false representation that his cheque was good and that he had funds in the bank to meet the cheque. The mere fact of a person giving a cheque when he knows he has no money in the bank to meet the cheque is a false representation: *Basil v. Bancroft* (1909) 3 Cr. App. Rep. 16; *Reg. v. Cooper* (1877) 13 Cox. C. C. 617, 46 L. J. M. C. 219; *Annotation* (1917) 34 D. L. R. 529; *R. v. Hazelton* (1873) L. R. 2 C. C. R. 134; *R. v. Cosnett* (1901) 20 Cox C. C. 6. In *Reg. v. Corey* (1883) 22 N. B. R. 544, cited by my learned friend, see judgment of King J., at page 549. *Kingsford v. Merry* (1856) 1 H. & N. 503.

(WHITE, J.: Do you contend that the property in the car passed, and that it would revert if the cheque was not paid?)

He obtained possessory title to the car. If anyone ran into him he could bring an action for damages. He could even give a good title to the car to a bona-fide purchaser for value. We submit that the conviction should be sustained, but failing that, that a conviction for attempting to obtain goods by false pretences be entered. There is no question at any rate that he attempted to obtain this property by false pretences: *R. S. Canada*, 1923, ch. 4 sec. 1016. For application of the principle see *James Marsten* (1918) 13 Cr. A. R. 203.

D. Mullin, K. C., in reply.

Cur. Adv. Vult.

1923. November 23. The following judgments were now delivered:

WHITE, J.: Agrees.

BARRY, J.: At the County Court of Kings on the third of July last, the prisoner was indicted, tried for and found guilty by a jury, of obtaining by false pretences a Durant, Model A, automobile, the property of T. J. Mercer; and on the 7th of July he was sentenced, for the said offence, to two years imprisonment in Dorchester penitentiary. An application for a reserved case was made to the judge of the county court which the judge refused, and, as it turns out, in view of the change in the law made by 13-14 Geo. V. cap. 41, properly refused, although it is probable that neither the learned judge nor the counsel engaged in the case were aware, or for that matter could be expected to be aware of the change in the law, that change having been made but three days previous to the commencement of the term at which the prisoner was tried. The county court judge's refusal to reserve a case was based upon grounds which, therefore, having regard to the change in the law, become unimportant.

By the statute which I have mentioned the old practice of reserving cases for the opinion of the Court of Appeal in criminal matters, and of appealing from the refusal of the trial judge to reserve a case for the Appeal Court, has been entirely superseded, and a mode of appeal against conviction directly to the Court of Appeal prescribed. It is under that legislation that the appeal has been heard, and it is under it that it has to be determined.

From numerous authorities it appears to be clear that where a party is induced by false representation to part with the possession of goods, but does not part with his right of property therein, there can be no conviction for obtaining the goods under false pretences: *Tremear Crim. Code* (1919, ed.) 498; *Archibold's Crim. Plead*, 26th ed., 525; *The King v. Nowe* (1904) 36 N. S. R. 531; 8 C. C. C. 441; *Rex v. Scheer* (1922) 32 Man. L. R. 487.

1924

THE KING

v.

McMANUS

BARRY, J.

1923

THE KING

v.

McMANUS

BARRY, J.

It appears by the record sent here that on the 13th of June the prisoner had negotiated with Mr. Mercer, the prosecutor, for the purchase of a car, and had signed and given to him a cheque for \$1,550.00 which, however, turned out to be bogus and of no value, there being no funds in bank to meet it. A perusal of the evidence discloses that the prosecutor never parted with the title to the property and never intended to part with it until he was paid the cash. He did not part with the car for the cheque or accept the cheque in payment for it. He says emphatically that he had no idea of giving up control of, or property in the car when he left it in the prisoner's possession at Hampton over night; but that he gave the prisoner clearly to understand that he was not parting with his property in the car until the cheque was verified and he found there was money in the bank to meet it on presentation. On the strength of the prisoner's assurance that he would have the car at Sussex at ten o'clock, or a little later, on the following morning, the car was left in his possession over night, that was all. Instead of taking the car to Sussex on the following morning as he had promised to do, the prisoner made off with it, and two days later was arrested at Florenceville, twenty-four miles above Woodstock, by Sheriff Foster of Carleton county, the car recovered and returned to its owner.

It is clear from this evidence that the accused should not have been convicted of obtaining the automobile by false pretences, for the prosecutor did not part with nor intend to part with his right of property in it, but merely the possession, and this does not constitute the offence: *Queen v. Kelham* (1783) L. R. 1, C. C. R., 263; *The Queen v. Letang* (1899) 2 Can. C. C. 505, 512 (note).

But while it is clear that the accused could not properly be convicted of the offence of obtaining the automobile by false pretences, it is equally clear that the jury could, under the indictment, if the evidence warranted, have found him guilty of an attempt to commit the offence charged. And on the actual finding it appears to me, as indeed it must

appear to any one who peruses the evidence, that the jury must have been satisfied of facts which proved him guilty of the attempt; their verdict amounts to a finding that not only had he attempted to commit the offence, but that he had in fact, so far as his intentions as shown by his overt acts were concerned, succeeded in the attempt.

As every attempt to commit a crime is itself an indictable misdemeanor at common law, whenever the intention to obtain money or goods by false pretences is manifested by any overt act, the party may be indicted for the attempt to commit the statutable misdemeanour (*R. v. Hensler* (1870) 11 Cox 570), and he may be convicted of the attempt to obtain, although the indictment charges an actual obtaining: *R. v. Roebuck* (1856) Dears & B. 24; Arch. Cr. Plead. 26th ed. 717. And by our own statute everyone who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not: Crim. Code, sec. 72.

The appellant here has been convicted of an offence upon indictment, and on that indictment the jury could have found him guilty of some other offence, *e. g.*, the offence of attempting to obtain goods by false pretences, and it clearly appears by the jury's finding that they must have been satisfied of facts which proved him guilty of attempting to obtain. In these circumstances it appears that we may now, instead of allowing or dismissing the appeal, substitute for the verdict found, that is, a verdict of guilty of obtaining goods by false pretences, a verdict of guilty of attempting to obtain goods by false pretences: Crim. Code, sec. 1016 (2) as amended by 13-14 Geo. V., c. 41. And it seems to me to be our clear duty to adopt that course, for I can see no extenuating circumstances in the conduct of the accused, nor any reason why he should go unpunished. We have the power to pass such sentence in substitution for the sentence passed by the trial court as may be warranted by law, for the offence of which the accused is by this court convicted. That is the

1923

THE KING

v.

McMANUS

BARRY, J.

1923.

THE KING
v.
McMANUS

course at times resorted to by the Court of Criminal Appeal in England under somewhat similar legislation: *Re James Marston* (1918) 13 C. A. R. 203.

BARRY, J.
GRIMMER, J.

For obtaining goods by false pretences the maximum punishment fixed by the Criminal Code is three years imprisonment (sec. 405) and for attempting to commit that offence, one-half of that term (sec. 517). It would, therefore, seem to me to be a perfectly just mode of disposing of the appeal, and one that would be fair to the prisoner, to sentence him to imprisonment in the common gaol of the county of Kings for eighteen months from the seventh of July last; the time he has already spent in the penitentiary to be taken into account and applied in reduction of the term of imprisonment in the county gaol.

GRIMMER, J.: This is an appeal from the Kings County Court, the learned judge thereof having after the trial refused to reserve a case upon the application of the counsel for the defendant.

The prisoner was indicted and convicted of the offence of obtaining goods under false pretences and undoubtedly could on that indictment have been found guilty of an attempt to commit the offence of which he was convicted, because it is apparent that upon the actual finding of the jury upon the facts proved in evidence they must have been satisfied of facts which proved the defendant guilty of the attempt to commit the offence, for that they have in fact found him guilty of the offence itself. It was contended, however, that in order to establish the crime of false pretences it must appear that the prosecutor parted with his possession or his property by a false representation of a past or existing fact, and that from the evidence in the case it was clear that he did not so part with the possession or his property but only did so because of a promise of the prisoner to return the property next morning, and that, therefore, the jury was not justified in convicting him of the main offence. Even if that be so, ample provision is now made under

Section 1016 of the Code as amended to prevent any miscarriage of justice where justice should properly be administered. Sub-section 2 of said section provides that —

“Where an appellant has been convicted of an offence, and the jury or as the case may be the judge or magistrate could on the indictment have found him guilty of some other offence, and on the actual finding it appears to the Court of Appeal that the jury, judge or magistrate must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found a verdict of guilty of that offence, and pass such sentence in substitution for the sentence passed by the trial Court as may be warranted in law for that other offence, not being a sentence of greater severity.”

Under this it is clear that instead of either allowing or dismissing the appeal this Court may now substitute for the verdict found a verdict of guilty of the offence of attempting to obtain the goods by false pretences, and pass such sentence in substitution for that passed by the trial Court as may be, as the statute says, warranted in law for the other offence, not being a sentence of greater severity.

Under the evidence it does appear questionable whether the jury was justified in arriving at the conclusion they did in finding the defendant guilty of obtaining the property by a false representation, but it is perfectly clear that there was sufficient evidence to justify them in finding, if they had so found, or to justify this Court in coming to the conclusion that the defendant was guilty of an attempt to obtain the property by false pretences, and it does seem that the justice of the case would be met by the adoption of the course provided by the amendment to the Criminal Code which has been cited.

The appeal will, therefore, neither be allowed nor dismissed, but there will be substituted by this Court for the verdict

1923

THE KING

v.

McMANUS

GRIMMER, J.

1923
THE KING
v.
McMANUS
—
GRIMMER, J.

found a verdict of guilty of an attempt to obtain goods by false pretences, and in substitution for the sentence passed by the trial Court the defendant will be sentenced to imprisonment in the common gaol of the county of Kings for the term of eighteen months, sentence to run from the seventh day of July last past, and the time spent by the defendant in the penitentiary at Dorchester to be taken into account as part of his present sentence.

New verdict and sentence substituted.

TAB 8

Court of King's Bench of Alberta

Citation: JBuck and Sons Inc v Resource Land Fund V, LP, 2023 ABKB 308

Date: 20230525
Docket: 2101 02799
Registry: Calgary

Between:

**JBuck and Sons Inc, JMB Investco (Can) L.P.,
JMB Investco (US) L.P., and JMB Investco (US) II L.P.**

Applicants

- and -

Resource Land Fund V, LP

Respondent

**Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby**

Introduction

[1] The Respondent, Resource Land Fund V, LP (“RLFV”), guaranteed the obligations of its wholly owned subsidiary, JMB Crushing Systems Inc. (“JMB Inc.”) as part of JMB Inc.’s acquisition of JMB Crushing Systems ULC (“ULC”) from the Applicants (the “Sellers”) pursuant to a Share Purchase Agreement dated November 18, 2018 (the “SPA”).

[2] The parties agreed in the SPA that part of the purchase price would be held back by JMB Inc. to account for potential tax liabilities of ULC. At the completion of the transaction, JMB Inc. and ULC amalgamated and then, after a time, became insolvent. The Sellers seek summary judgment against RLFV as guarantor in the amount of the tax holdback. RLFV says that the Sellers are not entitled to the tax holdback yet as the status of the tax obligation remains unresolved.

[3] RLFV asserts that it and JMB Inc. were induced to enter the SPA by misrepresentations by the Sellers concerning the financial condition of ULC. RLFV and JMB Inc. commenced a separate proceeding against the Sellers seeking damages. RLFV defended the present action by, among other things, asserting equitable set-off in the amount of the losses claimed in the parallel action. RLFV asserts that even if the Sellers are entitled to the tax holdback, it would be

inequitable for the Court to grant summary judgment because the holdback funds exist only because of the SPA which, in turn, was induced by the misrepresentations of the Sellers.

[4] This application requires me to decide whether the Sellers have established that there is no triable issue that they are entitled to the tax holdback funds. If so, I must decide whether RLFV has satisfied its burden to establish that there is a triable issue as to whether the Sellers' claim to the holdback funds is defeated by the defence of equitable set-off.

Summary Judgment Standard

[5] A five-member panel of the Court of Appeal set out the approach to summary disposition applications in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, [2019 ABCA 49](#). Slatter JA, writing for the Court, summarized the "key considerations" at para 47 as follows:

- a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute [emphasis in original].

[6] Following *Weir-Jones*, some confusion remained over what was meant by a "genuine issue requiring a trial." Wakeling and Feehan JJA clarified in *Hannam v Medicine Hat School District No. 76*, 2020 ABCA 343 at paras 158-161 that the definition of "genuine issue requiring a trial" to be used in Alberta is that set out by Karakatsanis J in *Hryniak v Mauldin*, 2014 SCC 7 at para 49:

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

[7] RLFV submits that the Sellers bear the onus of proving that the RLFV's defence of equitable set-off has no merit. RLFV relies on *776826 Alberta Ltd. v Ostrowercha*, 2015 ABCA 49 at paras 10-11 which, in my view, does not stand for the proposition that the moving party

bears the onus of proving that the non-moving party's defence has no merit. To the extent that there is any doubt what *Ostrowercha* means in terms of the onus on a non-moving party in a summary disposition application, that should be resolved by looking to *Weir-Jones*, which was decided later.

[8] *Weir-Jones*, quoted above, provides that the moving party has the obligation to prove its case on the balance of probabilities. If that is done, then the non-moving party has an obligation to establish that its defence or claim, as the case may be, raises a genuine issue for trial. As the Court of Appeal put it in *Weir-Jones* at para 47, the non-moving party “must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial” [emphasis added].

Background

[9] ULC was in the business of extracting, producing, and supplying aggregates throughout Alberta for the oil and gas industry, industrial projects, municipal road building, and other projects.

[10] On November 18, 2018, JMB Inc., RLFV, and the Sellers executed the SPA. The SPA provided that JMB Inc. would acquire ULC from the Sellers for \$40.15 million.

[11] At closing, JMB Inc. and ULC were amalgamated. The combined entity will be referred to hereafter as JMB Inc.

[12] Following the closing of the transaction, two of the former principals of ULC, Jeffrey Buck and Eugene Buck, were hired as the President and Controller, respectively, of JMB Inc.

[13] On May 1, 2020, Justice Eidsvik granted JMB Inc. an Initial Order pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

[14] Pursuant to the CCAA, the Court granted a Reverse Vesting Order (“RVO”) on October 16, 2020 in favour of Mantle Materials Group, Ltd. (“Mantle”). The RVO:

- (a) approved the sale of certain assets of JMB Inc. to Mantle, vesting those assets free and clear of any security interests or other claims other than permitted encumbrances;
- (b) granted an order vesting all JMB Inc.'s remaining assets and liabilities in 2324159 Alberta Inc. (“ResidualCo”); and
- (c) sanctioned an amended and restated joint plan of arrangement.

[15] On February 24, 2021, RLFV and JMB Inc. commenced an action against the Sellers for fraudulent and negligent misrepresentation, breach of contract, and several other causes of action (the “First Action”). The essence of the claim by RLFV and JMB Inc. against the Sellers is that the Sellers misrepresented the financial assets and condition of ULC. RLFV and JMB Inc. sought \$18.767 million in damages and other relief in the Statement of Claim. RLFV now says the damages are higher.

[16] On November 23, 2021, the Sellers commenced the present action against RLFV seeking \$2,480,120, which is the amount of the purchase price held back for unresolved tax liabilities (the “Second Action”).

[17] A Consent Order dated August 12, 2022 directed that the two actions “shall proceed together as if they had been consolidated, subject to the discretion of the presiding trial judge.” The Consent Order provided that it did not prevent specific claims or issues from being tried separately or determined on a summary basis.

The Sellers’ Tax Holdback Claim

The Tax Holdback

[18] The parties to the SPA agreed that the purchase price would be reduced to account for any unresolved tax liabilities identified in a pre-closing report prepared by accounting firm Grant Thornton (the “Unresolved Tax Liabilities”). Accordingly, the purchase price was reduced by \$2,480,120. This has been referred to by the parties as the tax holdback.

[19] The holdback mechanism for the Unresolved Tax Liabilities is provided for in section 5.8 of the SPA:

5.8 Unresolved Tax Liabilities

The Purchaser and the Company shall, following Closing, comply with any commercially reasonable requests of the Sellers in order to reduce or resolve any Unresolved Tax Liabilities, including the filing of any Tax elections, voluntary disclosures or other documents with the applicable Governmental Entity. For a period of the longer of (a) 24 months following the Closing Date, and (b) the date on which any claims made or actions taken by the Sellers during the 12 month period following Closing to reduce or resolve any Unresolved Tax Liabilities are resolved or ruled upon by the applicable Governmental Entity, the Purchaser shall pay to the Sellers’ Counsel, in trust on behalf of the Sellers, on a dollar-for-dollar basis any positive difference arising from a reduction or resolution of any Unresolved Tax Liabilities as compared to the final estimated Unresolved Tax Liabilities to be included in the Closing Statement.

[20] On September 19, 2019, the parties submitted a voluntary disclosure application (“VDA”) to the Canada Revenue Agency (“CRA”) to reduce or resolve the Unresolved Tax Liabilities. The VDA was denied by the CRA. The Sellers made a second VDA application on December 30, 2020, which was denied on March 4, 2021.

[21] On January 31, 2022, JMB Inc. was issued a tax assessment for \$1,721,991.61.

[22] On April 29, 2022, RLFV, on behalf of JMB Inc. and with the agreement of the Sellers, filed a Notice of Objection with the CRA arguing that the CCAA proceedings and the RVO released and discharged any potential liability flowing from the Unresolved Tax Liabilities and requesting that the tax claim be vacated. The CRA has not rendered a decision on the Notice of Objection.

Did the RVO Extinguish JMB Inc.’s Liability to the CRA?

[23] SPA s. 5.8 does not expressly contemplate the present scenario. SPA s. 5.8 contemplates the Unresolved Tax Liabilities being resolved by actions taken by the Sellers. JMB Inc. is required to cooperate with the Sellers’ efforts to resolve the Unresolved Tax Liabilities. What happened in the present case, according to the Sellers, is that the Unresolved Tax Liabilities were resolved by JMB Inc. obtaining the RVO in the CCAA proceeding.

[24] This requires me to consider the nature and purpose of the tax holdback. The purpose of the tax holdback was to protect JMB Inc. and RLFV from having to pay for the Unresolved Tax Liabilities. The portion of the purchase price held back to cover the Unresolved Tax Liabilities was never intended by the parties to remain in the hands of JMB Inc. or RLFV. It was to be paid either to the CRA or to the Sellers. As such, I agree with the Sellers that if the Unresolved Tax Liabilities have been resolved without payment to the CRA, the funds should flow to the Sellers.

[25] The Sellers submit that the Unresolved Tax Liabilities were resolved by the RVO issued in the CCAA proceedings. RLFV submits that the Unresolved Tax Liabilities remain unresolved and can be resolved only by a CRA ruling.

[26] RVOs allow a restructuring business to continue to operate through the debtor company, as opposed to migrating to a new entity, where the debtor company was a corporate vehicle that owned valuable assets that could not be transferred. An RVO involves the purchase of shares of the debtor company and the vesting out of the debtor to a new company of unwanted assets, obligations, and liabilities.

[27] Section 4(a) of the RVO provided that JMB Inc. retained title to all retained assets, free and clear of all interests, including taxes. RVO s. 4(a) provides:

JMB shall retain all of its right, title and interest in and to the JMB Retained Assets, free and clear of any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, actions, judgements, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise... [emphasis added].

[28] RVO s. 4(a) extinguishes tax liabilities and, accordingly, resolves the Unresolved Tax Liabilities. However, a finding that the RVO extinguished JMB Inc.'s tax liabilities would prevent the CRA from deciding on the Notice of Objection filed by RLFV with the support of the Sellers. The normal operation of the CRA process should not be foreclosed by an order of this Court operating under the CCAA without the CRA having an opportunity to take a position on the appropriateness of the order being sought.

[29] Following the hearing, I wrote to the parties to inquire whether the CRA had been given an opportunity to take a position on the appropriateness of the RVO. Counsel pointed me to the various reports of the Monitor in the CCAA proceedings that demonstrate that the CRA was engaged in discussions with the Monitor. In particular, the Monitor's 14th Report indicates that the Monitor brought an application to set a deadline for the CRA to advance a claim in the CCAA process for taxes owed by JMB Inc. The Report indicates that, in response to the application, the CRA advised the Monitor that it did not have a priority claim with respect to the Unresolved Tax Liabilities.

[30] Though the Monitor's reports contain hearsay, the evidence is necessary in the circumstances and is reliable because the Monitor was appointed by and is responsible to the Court. Romaine J concluded in **Re: SemCanada Crude Company (Celtic Exploration Ltd.)**, 2010 ABQB 531 at para 100 that Monitors' reports are admissible despite containing hearsay. Farley J in **Bell Canada International (Re)** [2003] OJ No 4738, 2003 CanLII 22640 (ONSC) at

para 6 observed that “a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding.”

[31] RLFV submits that the CRA’s failure to respond to the Notice of Objection filed on April 29, 2022 indicates that the CRA does not accept that the RVO extinguishes JMB Inc.’s tax liability. In my view, because the CRA has not responded to the Notice of Objection, its position is not clear. However, given that the CRA was a participant in the CCAA proceedings and could have taken a position on the appropriateness of the extinguishment of JMB Inc.’s tax liability prior to the Court issuing the RVO, I conclude that the Unresolved Tax Liabilities were resolved by the RVO.

RLFV’s Guarantee

[32] The Sellers submit that RLFV is responsible for paying the tax holdback funds because JMB Inc.’s responsibility was extinguished in the CCAA process and RLFV guaranteed JMB Inc.’s obligations under SPA s. 5.3. SPA s. 5.3 provides that RLFV guarantees payment of the purchase price which includes the tax holdback funds if the Unresolved Tax Liabilities are resolved. RLFV did not contest the validity of the guarantee. Accordingly, I find that RLFV is responsible for payment of the tax holdback funds to the Sellers subject to RLFV’s set-off defence considered in the following section of these Reasons.

RLFV’s Equitable Set-Off Defence

Equitable Set-off

[33] Wilson J in **Telford v Holt**, [1987] 2 SCR 193 at para 33 adopted Macfarlane JA’s summary of the principles of equitable set-off from **Coba Industries Ltd v Millie’s Holdings (Canada) Ltd and Tsang**, [1985] 6 WWR 14 (BCCA) at 22:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary’s demands: **Rawson v. Samuel**, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
2. The equitable ground must go to the very root of the plaintiff’s claim before a set-off will be allowed: [**Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.**, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: [**Fed. Commerce and Navigation Co. v. Molena Alpha Inc.**, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
4. The plaintiff’s claim and the cross-claim need not arise out of the same contract: **Bankes v. Jarvis**, [1903] 1 K.B. 549 (Div. Ct.); **Br. Anzani**.
5. Unliquidated claims are on the same footing as liquidated claims: **Nfld. v. Nfld. Ry. Co.**, [1888] 13 App. C. 199 (P.C.).

[34] Equitable set-off is a substantive defence. Blair J held in **Grand Financial Management Inc v Solemio Transportation Inc**, 2016 ONCA 175 at para 97:

Equitable set-off is a defence that is particularly rooted in the circumstances of the individual case. It requires, amongst other things, that the set-off claim go directly to impeach the plaintiff's demands, the "plaintiff" in this case being Solemio and the "claim" being an award of damages to compensate it for harm suffered as a result of an intentional wrongdoing – the tort of interference with economic relations. To put it another way, the defence requires that the set-off claim be so closely connected to the plaintiff's demands that it would be "manifestly unjust" to allow the plaintiff (Solemio) to enforce payment without taking into account the set-off claim [citations omitted].

[35] If the pleading of set-off in the present case raises a triable issue, which is considered later in this section of these Reasons, the Sellers do not dispute that the requirements of equitable set-off are satisfied. RLFV asserts that it and JMB Inc. were induced to enter the SPA by misrepresentations by the Sellers. The Sellers' claim to the funds held back for the Unresolved Tax Liabilities is rooted in the SPA. If RLFV's misrepresentation claims raise a triable issue, it would be inequitable to grant the Sellers summary judgment in respect of the funds held back for the Unresolved Tax Liabilities.

Pleading Issue

[36] RLFV has pleaded equitable set-off as a defence. The Sellers submitted that RLFV pleaded equitable set-off only in respect of negligent misrepresentation and that the pleading did not include the fraud claims pleaded in the First Action. This is significant because SPA s. 7.3 provides that notice of any claims in respect of the representations and warranties other than "intentional misrepresentation or fraud" must be provided by December 1, 2019, failing which "the Sellers are released from all obligations and liabilities in respect of such representations and warranties made by the Company and the Sellers and contained in this Agreement...." The Sellers submit that notice of JMB Inc.'s claims was delivered late and that the claims are now barred.

[37] RLFV's pleading of equitable set-off does not use the words "intentional misrepresentation or fraud" but does incorporate by reference pleadings of "wrongful conduct" in the First Action. This reference is a sufficient pleading of intentional misrepresentation or fraud because it directs the Sellers to the pleading in the First Action, of which they were well aware and which pleads intentional misrepresentation and fraud with appropriate particularity. I do not need to decide on this application whether JMB Inc.'s notice was delivered late as the notice requirement did not apply to intentional misrepresentation and fraud claims.

Purchase Price Adjustment

[38] The Sellers submitted that RLFV's pleading in the First Action is, in effect, seeking an adjustment of the purchase price. They say that this is improper because the SPA provides a process for the adjustment of the purchase price, which was followed and culminated in a mutual release. Essentially, the Sellers are asserting that this issue already has been determined.

[39] SPA s. 2.5 provided that the purchase price could be adjusted post-closing to account for changes in the Net Working Capital and Reserves of ULC. SPA s. 2.6 set out the post-closing purchase price adjustment process, which involved JMB Inc. engaging Grant Thornton to prepare a post-closing report to be submitted to the Sellers. If the Sellers did not accept Grant

Thornton's conclusions, the SPA provided that an Independent Accountant would be appointed by the parties to determine whether the purchase price should be adjusted.

[40] JMB Inc. obtained a post-closing report from Grant Thornton indicating that there should be a purchase price adjustment of \$7,387,639.67. The Sellers, supported by reports from their accounting advisors KPMG and PwC, disputed the purchase price adjustment. The Independent Accountant, Deloitte, determined that the purchase price should be adjusted by \$1.37 million. Following the determination of the purchase price adjustment by the Independent Accountant, the parties executed a Mutual Release dated November 21, 2018 with respect to all matters "arising out of the adjustments to the Purchase Price contemplated by Article 2 of the Purchase Agreement....".

[41] JMB Inc. now says that its losses from the Sellers' wrongful actions pleaded in the First Action and repeated in the equitable set-off claim in the Second Action are: (a) \$15 million with respect to Accounts Receivable; (b) \$7 million with respect to inventory; and (c) \$4.9 million with respect to prepaid expenses. Based on these descriptions, it is possible that there is some overlap between the alleged losses and the subject matter of the purchase price adjustment.

[42] Based on the record before me, however, I cannot find that the purchase price adjustment decision of the Independent Accountant and the Mutual Release extinguish JMB Inc.'s right to advance the claims made in the First Action and the defence of equitable set-off in the Second Action. The evidence is insufficient for me to determine whether the subject matter of the purchase price adjustment is the same as the subject matter of the alleged misrepresentations. In addition, Deloitte was concerned with accounting adjustments, not misrepresentations. Though the issues raised in the purchase price adjustment process and the misrepresentation claims may overlap to some degree, they involve different concepts and processes and may result in a different measure of loss. In particular, the Independent Accountant was not concerned with the intention of the Sellers or any alleged fraud nor did the Mutual Release purport to release such things.

[43] My conclusion is further supported by the structure of the SPA. The purchase price adjustment process in SPA s. 2.5 and 2.6 does not refer to the representations and warranties given in SPA s. 3 or to the survival of the representations and warranties provided for in SPA s. 7.3. If the purchase price adjustment process was intended to have the effect of extinguishing JMB Inc.'s right to rely on certain representations or warranties, it would have been easy for the drafters of the SPA to specify that.

Evidential Basis for Set-Off Claim

[44] JMB Inc.'s onus, as I set out earlier in these Reasons, is to demonstrate that its defence of equitable set-off raises a triable issue. A threshold problem is that some of the evidence in the Affidavit of Byron Levkulich is prefaced by statements such as "I am informed by Gowling WLG that thus far, the experts they retained identified..." and "Mr. Ryks advised RLF, including me, that he discovered...." This is hearsay.

[45] I explained in ***Barry v Industrial Alliance Insurance and Financial Service Inc (IAF)***, 2022 ABQB 265 at paras 51-59 that a party responding to a summary disposition application can rely on hearsay only if the statements meet the standard of admissibility that is applied at trial. In other words, it must be asked whether the statements fit within the traditional exceptions to the

rule against hearsay or meet the criteria for admissibility – necessity and reliability – pursuant to the principled approach to hearsay: **R v Bradshaw**, 2017 SCC 35 at para 23.

[46] Counsel for RLFV in a post-hearing written submission asserted that my decision in **Barry** was incorrect and that it is permissible for a party resisting summary judgment to rely on hearsay evidence. RLFV relies on several decisions, including **Attila Dogan Construction and Installation Co v AMEC Americas Ltd**, 2015 ABQB 120 at para 52, for the proposition that the new approach to summary disposition applications flowing from **Hryniak** “does not affect the evidentiary requirements for such applications.”

[47] Wittmann CJ in **Attila Dogan** considered the use of hearsay by an applicant for summary judgment, not a party seeking to resist a summary judgment application. Citing **Guarantee Co of North America v Gordon Capital Corp**, [1999] 3 SCR 423 at para 31, he observed at para 52 that “a self-serving affidavit in and of itself is not sufficient to create a triable issue in the absence of detailed facts and supporting evidence.” Iacobucci and Bastarache JJ in the para cited by Wittmann CJ from **Guarantee Co of North America** affirmed the longstanding principle that a party resisting summary judgment must provide evidence, not just assertions. This is not a proscription on use of hearsay by a party resisting summary judgment, but it imposes a high standard that in many cases will have the practical effect of excluding hearsay.

[48] The Ontario rules permit an affidavit based on information and belief to be used in an application for summary judgment by both the moving and non-moving party. The Ontario Court of Appeal, however, held in **Kawartha-Haliburton Children’s Aid Society v MW**, 2019 ONCA 316 at para 80 that on a summary judgment application:

The court must conduct a careful screening of the evidence to eliminate inadmissible evidence. The court should not give weight to evidence on a summary judgment motion that would be inadmissible at trial.

[49] The Ontario Court of Appeal elaborated on this approach in **Drummond v Cadillac Fairview Corporation Limited**, 2019 ONCA 447 at para 24:

If the evidence on information and belief in an affidavit goes to a fundamental contested aspect of the summary judgment motion, the motion judge should first determine whether the evidence would be admissible under the rules governing admissibility at trial. If the evidence meets those criteria, it is admissible on the motion. If the evidence does not meet the criteria for admissibility at trial, the onus should fall on the party proffering the evidence to justify some expansion of the rules governing admissibility in the context of the motion.

[50] **Drummond** sets out a pragmatic approach that is attractive and consistent with the culture change described in **Hryniak**. **Barry** should not be read as precluding the party proffering hearsay evidence from justifying a departure from the rules of admissibility as contemplated in **Drummond**. In the present case, however, RFLV did not attempt to justify admission of the hearsay in the Levkulich Affidavit apart from asserting that it was their right to adduce hearsay in response to a summary judgment application.

[51] The statements in the Levkulich Affidavit repeating what Gowling WLG was told by their experts or saying what Gowling WLG expects their experts to say are impermissible hearsay. They do not fit within any of the traditional exceptions to the rule against hearsay nor

are they necessary. The experts could have provided the information directly in the form of an affidavit with appropriate disclaimers stating that their work was not yet complete.

[52] Double hearsay asserting what a lawyer says an expert witness is expected to say is problematic for two additional reasons. First, it is indirect expert evidence from an expert who has not yet been qualified and which has not been adduced in accordance with the rules governing expert evidence: *Hoffart v Carteri*, 2020 SKCA 50 at para 56. Second, such evidence invites questioning on what the expert told the lawyer and what the lawyer told the client. Such questioning will almost certainly give rise to squabbling over the extent to which the communications were privileged and whether privilege was waived.

[53] The statements in the Levkulich Affidavit that repeat information supplied by Mr. Ryks are hearsay. Mr. Ryks was the Chief Financial Officer of JMB Inc. following the closing of the transaction. He is said to have investigated the financial affairs of JMB Inc. There is no apparent reason why he could not have reported the results of his investigation in an affidavit. The statements do not fit within any of the traditional exceptions to the rule against hearsay nor are they necessary.

[54] The question, then, is whether there is sufficient evidence without the inadmissible hearsay to establish that JMB Inc.'s equitable set-off claim raises a triable issue.

[55] The Levkulich Affidavit points to the Monitor's Second Report as evidence raising a triable issue. As discussed earlier in these Reasons, a report from a court-appointed Monitor is admissible despite containing hearsay. The Monitor's Second Report states that during the week ending June 19, 2020, the Chief Restructuring Advisor investigated JMB Inc.'s gravel inventories and formed the opinion that these inventories were significantly overstated.

[56] The following week, the Chief Restructuring Advisor advised the Monitor of his concerns and proposed an adjustment of \$9.8 million or 82.4% to eliminate the unsubstantiated inventory. On June 30, 2020, Jeffrey Buck resigned as President of JMB Inc. On July 6, 2020, the Monitor issued its Second Report stating that the proposed inventory restatement was a material adverse change.

[57] The Monitor's Second Report does not say whether the overstated inventory arose before or after closing of the transaction. Given that Jeffrey Buck was President of JMB Inc., it is reasonable to surmise that the same approach to gravel inventory prevailed before and after the transaction. As such, there is a triable issue as to whether there was an overstatement of gravel inventory and to what extent that overstatement is attributable to the periods before and after closing of the transaction.

[58] I am satisfied that the Monitor's Second Report provides sufficient evidence to indicate that there is a triable issue with respect to misrepresentations concerning JMB Inc.'s gravel inventory and that the magnitude of the issue may exceed that of the holdback for the Unresolved Tax Liabilities.

Conclusion

[59] I decline to grant summary judgment in favour of the Sellers for the tax holdback funds on the grounds that RLFV has raised a triable issue of equitable set-off.

[60] If the parties are unable to agree on costs, they may provide me with written submissions of five pages or less supported by a bill of costs.

Heard on the 8th day of May, 2023.

Dated at the City of Calgary, Alberta this 25th day of May, 2023.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Ken Lenz, K.C., Keely Cameron, Adam J. Williams, Bennett Jones LLP
for the Applicants

Alison J. Gray, Gowling WLG (Canada) LLP
for the Respondent

TAB 9

Court of King’s Bench of Alberta

Citation: McDonald v Sproule Management GP Limited, 2023 ABKB 587

Date: 20231017
Docket: 1601 08624
Registry: Calgary

Between:

Kevin McDonald

Plaintiff

- and -

Sproule Management GP Limited

Defendant

**Reasons for Judgment
of the
Honourable Justice M.A. Marion**

Table of Contents

I. Introduction..... 3

II. Procedural Background..... 4

III. The Record..... 5

 A. The McDonald Transcript and Rule 6.7 6

 1. Exhibits Marked During the Questioning are Part of the Transcript 7

2.	Documents Referenced but Not Marked as Exhibits are Not Part of the Transcript Unless the Parties Agree.....	8
3.	Undertaking Responses are Part of the Transcript, but Documents Produced with the Undertaking Responses Are Part of the Transcript Only if an Integral Part of the Substantive Answer	9
IV.	Issues.....	11
V.	Analysis.....	11
A.	Is there No Defence to McDonald’s Wrongful Dismissal Claim and No Genuine Issue Requiring a Trial in respect of the Claim or Defence?	13
1.	Has McDonald Discharged his Threshold Burden?.....	13
2.	Has Sproule Established that there is a Genuine Issue Requiring a Trial?.....	14
a.	The Legal Framework for Sproule’s Just Cause Defence	14
i.	Incompetence or Inability to Perform	15
ii.	Insubordination and Insolence	16
iii.	Employer Condonation	17
b.	Evidentiary Principles and Tools in Summary Judgment.....	18
c.	The Evidentiary Record for Sproule’s Just Cause Defence.....	22
d.	In Light of the Record, Does Sproule’s Just Cause Defence Raise Genuine Issues Requiring a Trial?	28
i.	The Nature and Extent of the Misconduct	28
ii.	The Surrounding Circumstances.....	28
iii.	Was Dismissal a Proportionate Response?	31
e.	Is it Possible to Summarily Resolve McDonald’s Claim and, if so, is the Court prepared to Exercise its Judicial Discretion to do so?.....	32
B.	Is it Possible and Appropriate to Determine Damages Summarily?.....	33
1.	Is it Possible and Appropriate to Summarily Determine the Notice Period?	33
a.	The Nature of the Implied Term Requiring Reasonable Notice ...	33

b.	Is Determining the Reasonable Notice Period Appropriate for Summary Judgment Generally?	34
c.	Is Summary Determination of the Reasonable Notice Period Appropriate in this Case?	35
d.	McDonald's Reasonable Notice Period	35
2.	Is it Possible and Appropriate to Fairly Resolve Sproule's Mitigation Defence Summarily?	38
3.	Is it Possible and Appropriate to Fairly Calculate McDonald's Damages Summarily?	39
a.	Salary, Vacation Pay and Earned Days	40
b.	Bonuses	40
c.	Benefits	41
d.	Mitigation Costs/Expenses	43
e.	Summary of Damages for Failure to Provide Reasonable Notice	43
4.	Is it Possible and Appropriate to Fairly Resolve McDonald's Bad Faith Damages Claim Summarily?	44
5.	Conclusion re Damages	46
VI.	Conclusion	46

I. Introduction

[1] The Plaintiff, Kevin McDonald (**McDonald**) applies (**Application**) for summary judgment against the Defendant, Sproule Management GP Limited (**Sproule**), in respect of his claim for wrongful dismissal. McDonald seeks judgment in the amount of \$985,799 compensation for lack of reasonable notice and \$489,696 in damages for the manner of termination and costs. McDonald asserts there is no merit to, or genuine issue requiring a trial respecting, Sproule's just cause defence, and that the damages are supported by the uncontradicted evidence. In the alternative, McDonald seeks directions from the court for the scheduling of a summary trial in the event the court finds that an assessment of damages is not feasible on the record before the court.

[2] Sproule argues that McDonald's claim is not suitable for summary judgment because there are material facts in dispute that involve credibility issues and the weighing of evidence. Sproule asserts that it had just cause both at the time of the termination and based on after-acquired cause. Sproule's position is that, if the court determines McDonald was dismissed without cause, a further hearing is required in connection with the issue of damages. However, it also argues that a notice

period of one-month per year of service is appropriate in the circumstances. Sproule advises that if summary judgment is not granted it expects to bring an application to have the action dismissed for delay.

[3] This Application addresses when the issues of just cause, determination of a reasonable notice period, assessment of damages, and claims of bad faith, are appropriately determined summarily in a wrongful dismissal case, and whether they can be determined in this case.

[4] For the reasons set out below, I find that there is no merit to Sproule's defence and there are no genuine issues requiring a trial. I further find that McDonald was wrongfully dismissed, was entitled to an 18-month notice period, and is entitled to damages and judgment in the amount of \$379,312.68, plus pre and post judgment interest. McDonald has not proven damages for bad faith or that his bad faith claim has merit.

II. Procedural Background

[5] On June 29, 2016, McDonald filed his Statement of Claim alleging, among other things, that his employment was terminated without cause "without any severance" on February 11, 2016. The Statement of Claim seeks (1) a declaration that he was wrongfully terminated without cause; (2) judgment for his base salary, benefits and other incentives to which he was entitled during a claimed 24-month notice period, plus out-of-pocket expenses incurred to mitigate his damages in seeking alternative employment; (3) judgment in an additional amount of three month's base salary in respect of Sproule's bad faith conduct toward McDonald; (4) pre-judgment interest pursuant to the *Judgment Interest Act*, RSA 2000 c J-1; and (5) costs.

[6] On July 28, 2016, McDonald noted Sproule in default. On August 10, 2016, McDonald filed an application for the determination of damages pursuant to rule 3.37 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*). That application did not proceed and, on August 18, 2016, Sproule filed its Statement of Defence (**Defence**).

[7] Sproule's Defence alleges just cause, and pleads at least 23 specific particulars supporting its cause position. It asserts Sproule paid McDonald all amounts due to him. In the alternative, Sproule denies a 24-month notice period is appropriate and pleads an approximate 12-month period of notice would be appropriate (less mitigating income). Sproule specifically denies the allegations that Sproule terminated McDonald in bad faith or was dishonest or high-handed.

[8] The parties exchanged Affidavits of Records within 6 months of the action commencing.

[9] On January 13, 2017, McDonald served Sproule with a comprehensive Notice to Admit Facts seeking Sproule's admission on 195 separate paragraphs. On February 1, 2017, Sproule filed its Reply to Notice to Admit Facts, which objected to the Notice and provided only three substantive responses. Sproule's response asserted that the Notice to Admit Facts was not served properly, was improper for various reasons, and that Sproule did not have time to review it. Sproule indicated it would reassess and re-address the Notice to Admit Facts after the questioning process, but there is no indication that it did so. McDonald suggested in argument that Sproule should be deemed to have admitted all the facts set out in the Notice to Admit Facts. I decline to take that approach. Sproule provided its denials and objections under rule 6.37. If McDonald felt that Sproule's responses were insufficient he could have applied to have Sproule provide further

information regarding its response: *MacKenzie v Estate of Michael Gregory*, 2022 ABQB 521. Instead, McDonald chose to press on with his summary judgment application. In these circumstances, Sproule’s response to the Notice to Admit Facts is better dealt with as a matter of costs at the conclusion of this action.

[10] On July 28, 2017, McDonald filed an application for summary judgment. In support, McDonald filed a July 28, 2017 affidavit (**McDonald Affidavit**).

[11] A dispute arose between the parties as to whether Sproule was entitled to conduct questioning for discovery under Part 5 of the *Rules* before the summary judgment application was heard. A Master held that Sproule could not do so, and this was upheld by Justice Neufeld on March 7, 2018. Sproule appealed and the Court of Appeal dismissed the appeal: *McDonald v Sproule Management GP Limited*, 2018 ABCA 295. Sproule was not allowed to conduct a questioning for discovery.

[12] Instead, in 2019, Sproule conducted an extensive questioning on the McDonald Affidavit over three days which produced a 504-page transcript (**Transcript**), excluding exhibits and responses to undertakings.

[13] Sproule filed six responding affidavits in June 2019 and one in July 2022 (**Sproule Affidavits**). The 2022 affidavit provided, among other things, that one of Sproule’s affiants, Harry Helwerda (**Helwerda**) died in June 2022 and is no longer available to provide evidence.

[14] On March 8, 2022, through his new counsel, McDonald filed the Application. On May 5, 2022, the Application was directed to a special application.

[15] Both parties filed written briefs of argument and I heard the Application on March 16, 2023. Sproule did not file any cross-application. At my request, the parties provided me supplemental written submissions on the question of what records are appropriately filed as part of a transcript of a questioning on an affidavit pursuant to rule 6.7(b).

III. The Record

[16] The sufficiency of the record is critical in a summary judgment application: *Hryniak v Mauldin*, 2014 SCC 7 and *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49.

[17] In this case, the record consists of:

- (a) the McDonald Affidavit;
- (b) the 504-page Transcript of the questioning on the McDonald Affidavit. There is an issue between the parties as to what must be filed as part of the “transcript” pursuant to rule 6.7, which I address later in these Reasons. Sproule did not conduct any questioning on McDonald’s undertaking responses;
- (c) the Sproule Affidavits, namely:

- (i) an affidavit of the chair of Sproule’s board of directors (**Board**) at the time of the termination, Lowy Gunnewiek (**Gunnewiek**). By the time he swore his affidavit, Gunnewiek was no longer affiliated with Sproule;
- (ii) an affidavit of Sproule’s President and a director at the time of the Termination, Helwerda. Helwerda reviewed the McDonald Affidavit and the Transcript before he swore his affidavit. By the time he swore his affidavit, he had been retired from Sproule since June 2016;
- (iii) an affidavit of Sproule’s Senior Vice President, Corporate & Legal and Corporate Secretary at the time of the Termination, Mark Van de Veen (**Van de Veen**). Van de Veen continued to work for Sproule at the time of his affidavit;
- (iv) an affidavit of Sproule’s Executive Vice President, and director, at the time of the Termination, Douglas Carsted (**Carsted**). Carsted reviewed the McDonald Affidavit, the Transcript, and the Helwerda Affidavit before he swore his affidavit. By the time he swore his affidavit, Carsted had been retired from Sproule since June 2017;
- (v) an affidavit of a consultant engaged by Sproule in 2014 and 2015, Valerie Cade (**Cade**). At the time she swore her affidavit, Cade had no role with Sproule;
- (vi) an affidavit of a consultant engaged by Sproule to assist with McDonald’s termination, Tony McGrath (**McGrath**). McGrath had no role with Sproule at the time he swore his affidavit; and
- (vii) a Van de Veen July 2022 affidavit.

[18] Even though the July 2022 Van de Veen affidavit discloses that Sproule produced “265 separate documents filling three separate four inch binders”, none of the Sproule witnesses appended records to their affidavits other than two short documents exhibited to Cade’s affidavit.

[19] McDonald argues that the Sproule Affidavits are of limited use because they include hearsay, conclusory or self-serving statements, or legal conclusions or opinion. I address the evidentiary principles associated with this Application later in these Reasons.

A. The McDonald Transcript and Rule 6.7

[20] An issue arose in argument as to what constitutes the “transcript” that must be filed pursuant to rule 6.7. Given the importance of the record in summary judgment applications, a clear interpretation of what exactly must be filed is necessary.

[21] Sproule filed the court-reporter-generated transcript of the questioning on the McDonald Affidavit but did not include with it the exhibits that were marked during the questioning, other records put to McDonald in the questioning but not marked as exhibits, or McDonald’s responses to undertakings (or attached records) given during the questioning. I inquired of the parties’

positions as to which, if any, of these documents should be considered part of and filed with the court-reporter-generated transcript. At my request, they provided supplemental written submissions. There is no judicial consideration or universally adopted practice or position as to what constitutes the transcript in Part 6, Division 1, of the *Rules*.

[22] Rule 6.7 provides that a person who makes an affidavit in support of, or in response or reply to, an application may be questioned under oath on the affidavit by a person adverse in interest, and that the “transcript of the questioning must be filed by the questioning party”. Rule 6.20(5) provides that the questioning party must arrange for the questioning to be recorded and to file the transcript unless the court otherwise orders. Rule 6.11(b) provides that a court may consider a transcript of questioning under Part 6 of the *Rules* in deciding an application. “Transcript” is not defined in the *Rules*.

[23] Rule 6.20 governs the form of questioning and transcript under Part 6 of the *Rules*. Rule 6.20(3) provides:

(3) The questions and answers must be recorded word for word by a person qualified to do so

- (a) by a method that is capable of producing a written transcript, and
- (b) in a manner agreed on by the parties or directed by the Court.

[24] A person “qualified” to “record and transcribe oral questioning under this Part” includes an official court reporter, an examiner under the *Alberta Rules of Court* (AR 390/68) or a shorthand writer sworn to record the questioning: rule 6.20. An official court reporter is obligated to honestly and accurately transcribe, and keep in safe custody of, the record of any proceeding or questioning taken by them, and to deliver a copy of the transcript as required by the *Rules*: rule 13.46.

1. Exhibits Marked During the Questioning are Part of the Transcript

[25] Sproule and McDonald agree that exhibits marked in a questioning on an affidavit should be filed along with the transcript in the ordinary course and Sproule did so after oral argument.

[26] Part 6, Division 1 of the *Rules* is silent as to whether exhibits marked by the official court reporter during questioning on an affidavit under rule 6.7 are part of the transcript. However, rules governing other questioning are clear. Rule 5.26(3) expressly provides that exhibits produced at discovery questioning under Part 5 of the *Rules* should be incorporated in or attached to the transcript or produced at the trial of the action without a notice to produce, unless otherwise agreed by the parties or ordered by the court. Rule 5.32 expressly contemplates that exhibits can be part of a transcript. Further, rule 6.23 contemplates that exhibits are to be included with the transcript upon return to the clerk of the court when evidence is authorized to be taken outside of Alberta (including in respect of an application).

[27] There is no principled reason why exhibits should form part of a transcript for some types of questioning and not others, and I do not interpret its express inclusion in some rules as intending to exclude them from other rules. In my view, marked exhibits form an integral part of the transcript and the principles from rules 5.26(3) and 5.32 apply, by analogy pursuant to 1.7(2), to

questioning under Part 6. Accordingly, I interpret the rules to mean that, absent agreement of all parties or other court order, the questioning party must file with the questioning transcript any marked exhibits (whether numbered or lettered exhibits for identification).

2. Documents Referenced but Not Marked as Exhibits are Not Part of the Transcript Unless the Parties Agree

[28] The parties also agree that documents that are referenced in a questioning on an affidavit under rule 6.7, but which are not marked as exhibits, do not form part of the transcript and should not be filed with the transcript. However, Sproule suggests that, while the court does not have jurisdiction to compel inclusion of those documents with the transcript, the court could strongly suggest that the documents be included failing which the court may draw an adverse inference.

[29] In my view, documents referenced in a questioning on an affidavit, but not marked as exhibits, do not form part of the transcript unless otherwise agreed by the parties or ordered by the court. I am aware of no legal or evidentiary principle that requires a party putting a record to a witness to invariably mark it as an exhibit even if it has been disclosed in an affidavit of records. There may be instances where it should be marked as an exhibit and would therefore become part of the transcript, however, no such instance was argued on the facts before me.

[30] I do not agree with Sproule that it is the court's role to comb through transcripts for records referenced that are not marked as exhibits and to then threaten to draw an adverse inference if they are not filed. It is up to the parties and their counsel to decide how to create the record for the court, including whether to mark a record as an exhibit. If there are disputes about whether a specific record ought to be marked as an exhibit, the court can resolve those disputes.

[31] Parties should be aware that, if documents referenced in a questioning are not marked as exhibits, it may affect the comprehensibility, usefulness or probative value of the questioning evidence in respect of those records. In a summary judgment application, knowledge of the existence of a record that is not before the court may affect the court's view about whether the record is sufficient to fairly resolve the dispute summarily. And, of course, if the records or their contents are not otherwise put into evidence, the court has discretion to draw an adverse inference as part of the fact-finding process, to be determined with reference to all of the evidence and pursuant to well-established principles: *Benhaim v St-Germain*, 2016 SCC 48 at para 52; *Baker v Weyerhaeuser Company Limited*, 2022 ABCA 83 at para 36; *Chateauvert v Chateauvert*, 2018 ABQB 2 at paras 182, 192-93, 204; *Howard v Sandau*, 2008 ABQB 34 at paras 39 and 44; *Stikeman Elliott LLP v 2083878 Alberta Ltd*, 2019 ABCA 274 at paras 87-88 (Slatter JA in dissent); *Potash Corporation of Saskatchewan Inc v HB Construction Company Ltd*, 2022 NBCA 39 at para 302; *R v AM*, 2022 ONCA 154 at para 34; *Singh v Reddy*, 2019 BCCA 79 at paras 1, 9, 10.

[32] Parties are encouraged to reach agreement as to whether records disclosed in an affidavit of records and put to a witness in questioning become part of the questioning transcript even if not marked as an exhibit. This is a common practice as a matter of expediency and efficiency, which will often be consistent with rule 1.2. Any such agreements should be put on the record to avoid misunderstandings or disputes and should expressly reference the parties' agreement that those records are to be treated as exhibits to, or otherwise part of, the transcript. In those circumstances,

those referenced records should be filed with the transcript unless the parties otherwise agree that they are not necessary.

3. Undertaking Responses are Part of the Transcript, but Documents Produced with the Undertaking Responses Are Part of the Transcript Only if an Integral Part of the Substantive Answer

[33] The parties disagree as to whether responses to undertakings given in a questioning on an affidavit under rule 6.7 are part of, or should be filed with, the transcript. Neither party produced any jurisprudence on this issue.

[34] Undertakings are only specifically contemplated in the context of questioning for discovery under Part 5 of the *Rules*. Those rules may provide some guidance on how to approach the issue under rule 6.7.

[35] Rule 5.30 provides:

Undertakings

5.30(1) If, during questioning, a person answering questions

- (a) does not know the answer to a question but would have known the answer if the person had reasonably prepared for questioning, or if as a corporate representative the person had reasonably informed himself or herself, or
- (b) has under the person's control a relevant and material record that is not privileged,

the person must undertake to inform himself or herself and provide an answer, or produce the record, within a reasonable time.

(2) After the undertaking has been discharged, the person who gave the undertaking may be questioned on the answer given or record provided.

[36] Rule 5.30 is an extension of the discovery process: ***Alderson v Wawanesa Life Insurance Company***, 2020 ABCA 243 at para 16.

[37] Rule 5.31 provides that, in certain circumstances, a party may use (or read-in) the evidence of the other party in a transcript of questioning under rules 5.17 or 5.18. Part 5 of the *Rules* does not specifically address whether undertaking answers form part of the transcript of questioning. There is an issue whether undertaking answers must be questioned upon under rule 5.30(2) (and presumably marked as an exhibit to the questioning) in order for them to become part of the Part 5 questioning transcript. In ***Signalta Resources Limited v Canadian Natural Resources Limited***, 2021 ABQB 867, at para 20, Justice Sidnell noted that undertakings “are part of the questioning which is given under oath” and that “allowing read-ins from testimony or responses to undertakings at trial contributes to trial efficiency and at the same time maintains the reliable evidence safeguard by requiring such evidence to be given under oath”.

[38] I agree with Justice Sidnell that undertaking requests are part of the questioning. In my view, the answers are also part of the questioning which are responded to later but nonetheless still subject to the oath. While rule 5.30(2) provides a mechanism to allow questioning on the undertaking answers (which could allow them to be marked as an exhibit), in my view it is not *necessary* to do that in order to have the undertaking answers form part of the transcript so they may be read-in at trial. Undertaking answers are part of the transcript of questioning under Part 5 of the *Rules* whether or not they are questioned upon because they form the belated answers to the questions that the witness was not able to answer at the time. In my view, while rule 5.30(2) is an important mechanism to explore, test, challenge or clarify the undertaking answers, it would be inefficient and impractical to require the questioning party to have the witness reattend for questioning in every case so that the answers could be marked as an exhibit.

[39] As noted, there is no provision like rule 5.30 in Part 6 of the *Rules*. It is well-established that undertaking requests may be appropriate in limited circumstances in a questioning on an affidavit, including where the deponent relied on documents or information in making the affidavit, or where the undertakings relate to an important issue in the application and it would not be too onerous to respond: ***Kostic v Scott Venturo Rudakoff***, 2022 ABQB 188 at paras 24 and 25(h); ***Edmonton v Gosine***, 2020 ABQB 546 at para 17; ***Rieger v Plains Midstream Canada ULC***, 2019 ABQB 666 at para 7; ***Dow Chemical Canada Inc v Shell Chemicals Canada Ltd***, 2008 ABQB 671 at para 5. Of course, it is also always open to a party to agree to provide requested undertakings (for example, to streamline the litigation process).

[40] In my view, even if rule 5.30 does not technically apply to questioning under Part 6 of the *Rules*, it applies by analogy pursuant to rule 1.7(2), as modified by the jurisprudence noted above that restricts its use in questioning on an affidavit. Further, I see no principled basis to differentiate between Part 5 questioning or Part 6 questioning when determining what forms part of the transcript.

[41] Accordingly, I find that, unless otherwise agreed or ordered by the court, undertaking answers form part of the transcript to a questioning on an affidavit pursuant to rule 6.7 and should be filed with the transcript. Records produced as part of the undertaking answers should be filed as part of the transcript where they form an integral part of a substantive factual answer to the question asked, but do not need to be filed where they are only produced in response to an undertaking request to produce records. This latter exclusion avoids filing of potentially large bundles of records produced in response to a procedural undertaking request to *do something*, namely producing documents, as opposed to a substantive undertaking request to answer a factual question. If the questioning party wishes to have such procedurally produced records part of the evidentiary record, they should conduct a follow-up questioning on the undertaking answers and associated records.

[42] Concern has been expressed about the practice that undertaking answers are often produced with the assistance of third parties, or counsel, and that parties may use the undertaking answer as a trojan horse to include additional information or to couch the answer in strategically crafted language. Those concerns can be addressed by applying to have the superfluous, inappropriate or non-responsive undertaking answer struck from the record, by arguing that the non-responsive or irrelevant portions of the answer should be given little or no weight, or by questioning on them.

Parties are encouraged to discuss and reach agreement on the contents of the transcript to be filed pursuant to rule 6.7 wherever possible.

[43] In this case, McDonald's counsel provided me a letter dated July 30, 2019 which included the portions of the undertaking answers and associated records on which McDonald relies. At my request, the full undertakings and produced records were provided to me pending my decision on whether they needed to be filed. Sproule's counsel is directed to file McDonald's undertaking responses as part of the McDonald transcript. With respect to the records produced as part of the undertaking answers, only the records associated with Undertakings #4 and #8 are integral to the answer to a substantive factual question that was asked and should be included with the filed transcript.

[44] In this application, I have only considered the undertaking answers (all of them) and the records provided in respect of undertakings #4 and #8.

IV. Issues

[45] The issues in the Application are:

- (a) Is there no defence to McDonald's wrongful dismissal claim and no genuine issue requiring a trial in respect of that claim? In particular:
 - (i) Has McDonald met his threshold burden to show no defence and no genuine issue for trial?
 - (ii) Has Sproule met its burden to establish to establish a genuine issue for trial?
 - (iii) Is it possible to summarily resolve McDonald's claim and, if so, is the court prepared to exercise its judicial discretion to do so?
- (b) If necessary, is it possible or appropriate to summarily determine damages?
- (c) What is an appropriate order in this case?

V. Analysis

[46] Rules 7.3(1)(a) and 7.3(1)(c) together provide that a plaintiff may apply for summary judgment in respect of all or part of a claim where there is no defence to a claim or part of it, or where the only real issue is the amount to be awarded.

[47] Summary judgment cannot be granted if the application presents a genuine issue for trial: ***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343 at para 13; ***Clearbakk Energy Services Inc v Sunshine Oilsands Ltd***, 2023 ABCA 96 at para 5.

[48] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to

apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak* at para 49; *Weir-Jones* at para 21.

[49] The proper approach to summary dispositions in Alberta has been laid out by the Court of Appeal in *Weir-Jones* at para 47 (emphasis in original):

[47] The proper approach to summary dispositions, based on the *Hryniak v Mauldin* test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

- (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- (b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a “just result”, or there is a genuine issue requiring a trial.

[50] The court has a duty to take a “hard look” at the merits of the claim or defence on a summary judgment application: *Weir-Jones* at para 44.

A. Is there No Defence to McDonald's Wrongful Dismissal Claim and No Genuine Issue Requiring a Trial in respect of the Claim or Defence?

[51] At common law, an employer has a right to terminate an employment contract without cause, subject to an implied term of the contract which imposes a duty on the employer to provide reasonable notice; if reasonable notice is not provided, the employee is entitled to damages for breach of contract: *Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26 at paras 38 and 43; *Honda Canada Inc v Keays*, 2008 SCC 39 at para 50 [*Keays*].

[52] McDonald asserts that Sproule breached his employment contract by failing to give him reasonable notice of the termination of his employment and is entitled to damages in lieu of notice.

[53] Sproule's primary defence is that it had just cause to terminate McDonald's employment and it therefore was not obligated to provide him reasonable notice.

1. Has McDonald Discharged his Threshold Burden?

[54] A plaintiff applicant for summary judgment has the initial burden to provide the factual elements of its case (that is, the facts on which it relies), on a balance of probabilities, that there is no defence, and that there is no genuine issue requiring a trial: *Weir-Jones* at paras 31-35 and 47(b); *Giustini v Workman*, 2021 ABCA 65 at paras 22- 24; *P & C Lawfirm Management Inc v Sabourin*, 2020 ABCA 449 at paras 38-39; *Hannam* at paras 145-151.

[55] In the context of a wrongful dismissal claim, the summary judgment analysis must recognize that the allocation of the civil burden is more complicated, with the plaintiff having the burden to show their employment was terminated, the defendant having the burden to establish just cause or lack of mitigation, and the plaintiff having the burden to prove condonation of misconduct by the employer: *Haack v Secure Energy (Drilling Services) Inc*, 2021 ABQB 82 at para 110; *Rudichuk v Genesis Land Development Corp*, 2019 ABQB 133 [*Rudichuk QB*] at paras 37-40, affirmed 2020 ABCA 42 [*Rudichuk CA*].

[56] Accordingly, it will usually be sufficient for a wrongful dismissal summary judgment plaintiff-applicant to meet its initial threshold to establish that there is no genuine issue respecting the terms of their employment contract and that they were dismissed without notice or payment in lieu of notice: *Rudichuk QB*, at paras 37-40. The plaintiff-applicant does not need *disprove* positive defences for which the defendant has the onus of proof, such as a just cause defence or failure to mitigate defence: *JBuck and Sons Inc v Resource Land Fund V, LP*, 2023 ABKB 308 at paras 7, 8; *Cicalese v SSMPG Integrating Services Inc*, 2020 ABQB 605 at paras 207-08. The identification of positive defences is one way that a defendant-respondent can meet its burden in resisting summary judgment: *Weir-Jones* at para 35.

[57] In my view it is also important that courts do not make the threshold burden and responding burden analysis overly-complicated or formalistic because, as pointed out by the Court of Appeal, the court's key considerations set out at paragraph 47 of *Weir-Jones* need not be followed sequentially or in any particular order, and the applicant will always have the ultimate burden to show that a claim or defence has no merit and there are no genuine issues requiring a trial: *Weir-Jones* at para 35 and 47.

[58] The McDonald Affidavit established that his employment with Sproule (or its related successor corporations) commenced in December 2003 and that he was terminated in February 2016 without notice and without payment in lieu of notice. Those undisputed facts are sufficient for McDonald to discharge his threshold burden. In any event, the McDonald Affidavit went further: it specifically provided positive evidence denying every Defence just cause allegation.

[59] McDonald met the **Weir-Jones** threshold burden and Sproule has the burden to establish a genuine issue requiring a trial.

2. Has Sproule Established that there is a Genuine Issue Requiring a Trial?

[60] To meet its evidentiary burden and resist summary judgment, Sproule must put its best foot forward and demonstrate from the record a positive defence or a genuine issue requiring a trial: **Weir-Jones** at paras 32, 35 and 47(c); **Geophysical Service Incorporated v Plains Midstream Canada ULC**, 2023 ABCA 277 at para 14.

[61] Sproule alleges numerous facts supporting just cause, based on insubordination (and possibly disobedience), insolence, sub-standard performance, incompetence, and inability to perform.

[62] Sproule also asserts that there are genuine issues requiring a trial of its just cause defence because there are conflicts in the evidence and credibility issues.

a. The Legal Framework for Sproule's Just Cause Defence

[63] Terminating an employee for just cause has been referenced as the “capital punishment” of employment of law: **Ross v IBM Canada Limited**, 2015 ABQB 563 at para 30. The onus is on the employer to prove just cause: **Haack** at para 110; **Whitford v Agrium Inc**, 2006 ABQB 726 **Whitford** at para 30.

[64] A finding of misconduct does not, in and of itself, give rise to just cause for termination of employment - the employee's behaviour must be such that gave rise to the breakdown of the employment relationship so that the employment relationship could no longer viably subsist: **Baker** at para 28, citing **McKinley v BC Tel**, 2001 SCC 38 (CanLII), [2001] 2 SCR 161 at paras 29, 48-49. The core question is whether the employee has engaged in sufficiently serious misconduct that is incompatible with the fundamental terms of, that strikes at the heart of, or is a repudiatory breach of, the employment relationship: **Baker** at para 28, citing **Dowling v Ontario (Workplace Safety and Insurance Board)** (2004), 2004 CanLII 43692 (ON CA), 192 OAC 126; **Haack** at para 409; **Smith v Vauxhall Co-op Petroleum Limited**, 2017 ABQB 525 at para 12 [**Vauxhall**].

[65] The **McKinley** framework involves a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct: **Baker** at para 28; **Dowling** at para 49. It involves consideration of (1) the nature and extent of the misconduct; (2) the surrounding circumstances; and (3) whether dismissal is a proportional response: **Baker** at para 28.

[66] At the first step, an employer is entitled to rely on after-discovered wrongdoing: **Baker** at para 28; **Lake Ontario Portland Cement Co v Groner**, 1961 CanLII 1 (SCC), [1961] SCR 553, at 563-64; **Haack** at para 414. However, the employer cannot rely on the employee's conduct *after* the termination: **Baker** at para 28; **Haack** at para 415; **Underhill v Shell Canada Limited**, 2020 ABQB 341 at para 48; **Gillespie v 1200333 Alberta Ltd**, 2012 ABQB 105 at para 29.

[67] The second step considers the particular circumstances of the employee (including age, employment history, seniority, role and responsibilities) and the employer (including its type of business, relevant policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee): **Baker** at para 28.

[68] The third step, proportionality, is an assessment of whether the misconduct is reconcilable with sustaining the employment relationship, which requires a consideration of the proved conduct, within the employment context, to determine whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship: **Baker** at para 28; **Vauxhall** at paras 119-20; **Jegou v Canadian Natural Resources Limited**, 2021 ABQB 401 at para 255;

[69] Given the identity and self-worth individuals frequently derive from their employment, an effective balance must be struck between the severity of an employee's conduct and the sanction imposed: **McKinley** at 52-53. Except for the most serious circumstances, an employer should use progressive discipline or alternative sanctions before terminating an employee for misconduct: **Mack v Universal Dental Laboratories**, 2020 ABQB 738 at para 101; **Underhill** at paras 100-01; **OWL (Orphaned Wildlife) Rehabilitation Society v Day**, 2018 BCSC 1724 at para 144; **Henson v Champion Feed Services Ltd**, 2005 ABQB 215 at paras 34, 56; **Cumberland v Maritime College of Forest Technology**, 2023 NBKB 65 at para 69.

[70] As discussed below, in the application of the **McKinley** framework over time, certain principles have developed to further guide or refine the contextual analysis in respect of different types of employee misconduct.

i. Incompetence or Inability to Perform

[71] Summary dismissal based on incompetence requires more than employer dissatisfaction with the work, or that the employee was careless or indifferent: **Bogden v Purolator Courier Ltd**, 1996 CanLII 10572, 182 AR 216 (QB) at para 59; **Haack** at para 419.

[72] Where an employer alleges cause for incompetence, the employer must show: (1) the level of job performance that it required and that the level required was communicated to the employee; (2) the employer gave suitable instruction to enable the employee to meet the standard; (3) the employee did not meet or was incapable of meeting the standard, for reasons that were within the employee's control; and (4) there had been a warning to the employee that failure to meet the standard would result in his dismissal: **Haack** at paras 418-419; **Whitford** at paras 35-37; **Mitran v Guarantee RV Centre Inc**, 1999 ABQB 276 at para 94.

[73] If specific instances of incompetence are insufficient to justify cause on their own, the employer may allege cumulative cause. In those instances, the employer must prove that: (1) the employee was given express and clear warnings about his performance; (2) the employee was

given a reasonable opportunity to improve their performance after the warning was issued; (3) notwithstanding the foregoing, the employee failed to improve their performance; and (4) the cumulative failings “would prejudice the proper conduct of the employer’s business”: **Lowery v Calgary (City of)**, 2002 ABCA 237 at para 3; **Motta v Davis Wire Industries Ltd**, 2019 ABQB 899 at para 41; **Rutkowski v Edmonton Transit Mix & Supply Co Ltd**, 2007 ABQB 277 at para 92; **Whitford** at para 38.

ii. Insubordination and Insolence

[74] Wilful disobedience, insubordination and insolence are sometimes equated, used interchangeably, conflated or considered together; the label attached to the category of misconduct informs but does not override the contextual determination which is always based on the **McKinley** framework: **Thomas v Saskatchewan Indian Gaming Authority Inc**, 2021 SKCA 164 at para 25, cited with approval in **Baker** at para 29; **Henry v Foxco**, 2004 NBCA 22 at para 13.

[75] Wilful disobedience has been held to involve the wilful defiance of an employee of lawful, reasonable and clear orders or instructions of a superior, or refusal to carry out well-known and necessary policies or procedures, that effectively repudiates the essential condition of the employment relationship that employees must obey their employer’s instructions: **Motta** at para 107; **Karmel v Calgary Jewish Academy**, 2015 ABQB 731 at para 16; **Wilson v KP Manufacturers (Calgary) Ltd**, 1998 CanLII 18141, 225 AR 205 (QB) at paras 10-11; **Beaudoin v Agriculture Financial Services Corporation**, 2018 ABQB 627 at para 47.

[76] Insubordination has been described more broadly as any refusal to follow instructions, and any other conduct that constitutes a challenge to persons in authority or their policies: **Hoffert v Golder Associates Ltd**, 2017 ABQB 341 at paras 91, 117.

[77] The court must assess all relevant circumstances to determine if wilful disobedience or insubordination justifies summary dismissal: **Motta** at paras 14-16; **Hoffert** at para 90; **Amos v Alberta**, 1995 CanLII 9287, 166 AR 146 (QB) at paras 42-44.

[78] Insolence towards the employer is treated similarly to insubordination, although it engages slightly different considerations: **Motta** at para 54; **Henry** at para 34. Insolence has been defined as the use of “insulting, abusive, threatening or unreasonably violent words”: **Partridge v Botony Dental Corporation**, 2015 ONSC 343 at para 32 affirmed 2015 ONCA 836; as “haughty and contemptuous or brutal behaviour or language”: **Mellquist v Lake of the Rivers (Rural Municipality)**, 1987 CanLII 4951, 62 Sask R 165 (QB) at para 21; or as “derisive, contemptuous or abusive language or conduct directed by an employer at his/her employer”: **Bennett v Cunningham**, 2011 ONSC 28 at para 15. In this case, Sproule pleads that McDonald was belligerent (“inclined to or exhibiting assertiveness, hostility, or combativeness”; “waging war”: *Merriam-Webster Dictionary*, online: Merriam-Webster.com <https://www.merriam-webster.com/dictionary/belligerent>) and bellicose (“favoured or inclined to start quarrels or wars”: *Merriam-Webster Dictionary*, online: Merriam-Webster.com <https://www.merriam-webster.com/dictionary/bellicose>). In my view those allegations involve similar considerations as insolence.

[79] Insolence can justify summary dismissal of an employee if: (1) the employee and superior are no longer capable of maintaining a working relationship; (2) the incident undermined the supervisor's credibility in the workplace and, relatively, their ability to supervise effectively; or (3) that because of the incident, the employer suffered a material financial loss, a loss of reputation or its business interests were seriously prejudiced: **Motta** at para 53; **Henry** at para 111. Context and proportionality govern, including where strong exchanges have been a tolerable part of the culture of the workplace: **Motta** at para 54; **Dawson v Bridge Brand Food Services Ltd**, 2007 ABQB 15 at para 39.

iii. Employer Condonation

[80] Even if misconduct is proven, an employee may argue that an employer has condoned the employee's conduct and therefore cannot rely on it to terminate for cause. The employee has the onus to prove condonation: **Haack** at para 423; **Vauxhall** at para 130; **Cicalese v Saipem Canada Inc**, 2018 ABQB 835 at para 36.

[81] When an employer becomes aware of the misconduct sufficient to justify dismissal, the employer may elect to dismiss the employee or may overlook the fault: **Foerderer v Nova Chemicals Corporation**, 2007 ABQB 349 at para 124; **Acumen Law Corporation v Ojanen**, 2019 BCSC 1352 at para 35, affirmed 2021 BCCA 189. If the employer knowingly accepts misconduct, it constitutes condonation and the employer is generally prohibited from relying upon such behavior as grounds for dismissal: **Mitran** at para 102, citing **Hardie v Trans-Canada Resources Ltd** (1977), 1976 CanLII 1102, 2 AR 289 (CA).

[82] Condonation can be inferred from the circumstances of the case and the omissions or commissions of the employer: **Cicalese v Saipem** at para 38; **Mitran** at para 102; **Foerder** at para 125.

[83] Condonation may result by omission if the employer fails to warn an employee within a reasonable time that the behaviour is unacceptable, or if the employer allows the employee to continue in his or her position for a considerable period of time: **Cicalese v Saipem** at para 37; **Vauxhall** at para 129; **Foerder** at para 125; **Mitran** at paras 100, 102; **Clarke v Syncrude Canada Ltd**, 2013 ABQB 252 at para 46.

[84] Condonation may also result from the employer's positive conduct, for example by giving the employee a promotion, raise or positive performance reviews: **Bogden** at para 60; **Mitran** at para 102; **Barnard v Testori**, 2000 PESCTD 43, 194 Nfld & PEIR 119 at para 58; **Meaney v Agnes Pratt Home**, 1989 CanLII 4847, 74 Nfld & PEIR 18 at para 35; **Lambe v Irving Oil Ltd**, 2002 CanLII 22789, 219 Nfld & PEIR 183 at para 109.

[85] However, the court is entitled to take the cumulative effect of an employee's record into account when determining whether dismissal is justified: **Poliquin v Devon Canada Corporation**, 2009 ABCA 216 at para 73. The cumulative impact of a number of instances of unacceptable conduct may justify dismissal, even where some of those earlier instances were condoned, because condonation is subject to an implied condition of future good conduct: **Mack** at para 96, citing **Chambers v Omni Insurance Brokers**, 2002 CanLII 44952 (ONCA), [2002] OJ No 2063 (QL) at para 45; **Mitran** at para 103 (and cases cited therein).

b. Evidentiary Principles and Tools in Summary Judgment

[86] The Sproule Affidavits raise numerous facts that dispute McDonald’s evidence and, on their face, create credibility issues between McDonald and the Sproule witnesses. Those affidavits provide some detailed and direct factual background of some matters, but they also include numerous undocumented or unsupported bald assertions, conclusory statements, vague references, personal opinions, and hearsay (including hearsay from other Sproule affiants).

[87] The traditional understanding, that a dispute about a material fact disqualifies an action from the summary judgment process, is no longer valid: **Hannam** at para 147. Summary judgment is not limited to cases where the facts are not in dispute: **Hannam** para 147; **Weir-Jones** at para 21. A summary judgment court should not be reluctant to make material fact findings, but before it does so it should ask if it constitutes a genuine issue requiring a trial: **Hannam** at paras 148-149. As noted in **Weir-Jones** at para 47(a), the court does this by asking: “[h]aving regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?”

[88] In my view, in order to honour the guiding principles set out by the Supreme Court of Canada and Alberta Court of Appeal, including supporting the public policy of improved access to justice, summary judgment courts must distill the record to remove, disregard or give little weight to inadmissible, inappropriate or unhelpful evidence to get to the core of the matter and determine whether there are any “genuine” issues requiring a trial (as opposed to a party’s views, positions, arguments, allegations, speculation, conjecture, interpretation, opinions, beliefs, hopes or desires). As stated by the Ontario Court of Appeal in **Kawartha-Haliburton Children’s Aid Society v MW**, 2019 ONCA 316 at para 80, courts “must conduct a careful screening of the evidence to eliminate inadmissible evidence. The court should not give weight to evidence on a summary judgment motion that would be inadmissible at trial.”

[89] If, after screening, there remains a dispute on material facts, or one depending on issues of credibility, it is a marker that there may be genuine issues regarding a trial: **Hannam** at para 149; **Weir-Jones** at paras 35 and 38.

[90] It is helpful to summarize some of these screening principles, together with other evidentiary principles that guide courts in assessing a summary judgment application.

[91] First, with respect to applicant affidavits, they should generally be based on personal knowledge: rule 13.18(3): **Magnuson Estate**, 2023 ABKB 305 at paras 35-38; **Consolidated Civil Enforcement Inc v Shipalesky**, 2022 ABKB 718 at para 30; **Moore v Wetaskawin Friends and Horizons Training**, 2022 ABKB 617 at para 34; **Van Grinsven v Kortbeek**, 2022 ABQB 138 at para 32; **Malkhassian Estate v Scotia Life Insurance Company**, 2020 ABQB 173 at para 40; **From Estate**, 2019 ABQB 988 at para 103; **Clark Builders and Stantec Consulting Ltd v GO Community Centre**, 2019 ABQB 706 at para 40; **DD v Calgary Counselling Centre**, 2017 ABQB 95 at para 44; **Attila Dogan Construction v AMEC Americas Limited**, 2015 ABQB 120 at para 52 affirmed 2015 ABCA 406.

[92] However, there is some flexibility in the application of rule 13.18(3) in the context of summary judgment applications – sometimes evidence not based on personal knowledge can be

admitted. For example, courts may be more flexible where the applicant is a corporation or estate, where there are no people left with personal knowledge, or where the evidence would be admissible at trial as an exception to hearsay: **Magnuson Estate** at para 38; **Moore** at paras 35 and 38-40; **Spady v Spady Estate**, 2022 ABQB 591 at para 56; **Barry v Industrial Alliance Insurance and Financial Services Inc (IAF)**, 2022 ABQB 265 at para 53; **Pure Environmental Waste Management Ltd v Lonquist Field Service (Canada), ULC**, 2022 ABQB 30 at para 47; **Saito v Lester Estate**, 2021 ABCA 179 at paras 11-12; **County of Vulcan v Genesis Reciprocal Insurance Exchange**, 2020 ABQB 93 at paras 70-71; **Goodswimmer v Canada (Attorney General)**, 2017 ABCA 365, leave to appeal ref'd [2018] SCCA No 1 at para 33; **Klein v Wolbeck**, 2016 ABQB 28 at para 15; **Attila Dogan** at paras 64-75; **Murphy v Cahill**, 2012 ABQB 793 at paras 26-30.

[93] Second, with respect to respondent affidavits, they may include hearsay evidence based on information and belief, provided the source of the information is disclosed: rules 13.18(1)(b) and 13.18(2); **Magnuson Estate** at para 42; **Van Grinsven** at para 32; **Malkhassian Estate** at para 40; **From Estate** at para 103; **DD** at para 43; **Clark Builders** at para 40; **Murphy v Cahill** at para 26.

[94] However, admission of the evidence is not necessarily enough - just because hearsay can be included in respondent affidavits does not mean it will or should be accepted by the court or given weight: **Malkhassian Estate** at para 41; **McDonald v Brookfield Asset Management Inc**, 2016 ABCA 375 at para 18, leave to appeal to SCC refused 37438 (1 June 2017) [**Brookfield**]; **ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)**, 2019 ABQB 653 at paras 21 and 58; **Murphy Oil Company Ltd v Predator Corporation Ltd**, 2006 ABCA 69 at paras 38-40. For example, respondent hearsay evidence may not be accepted or given weight in respect of the substantive issues to be decided on the summary judgment application, unless the hearsay evidence can be brought within an exception to the hearsay rule such that it would be admissible at trial: **Magnuson Estate** at para 39; **Moore** at para 37; **Barry** at paras 57-59; **County of Vulcan** at paras 76-77; **ANC Timber** at para 58. Hearsay may also possibly be admissible if the respondent can “justify some expansion of the rules governing admissibility” in the context of the summary judgment application, for example, if the opposing party had a fair chance to challenge the hearsay evidence: **JBuck** at paras 47-50 (relying on **Drummond v Cadillac Fairview**, 2019 ONCA 447 at para 24).

[95] Third, hearsay evidence in questioning on affidavits is presumptively inadmissible: **Fitzpatrick v The College of Physical Therapists of Alberta**, 2020 ABCA 164 at para 22; **ANC Timber**, at para 60; **Mitchell v Pytel**, 2021 ABQB 403 at para 23.

[96] Fourth, bald, conclusory, argumentative or self-serving statements, personal opinion, allegations, speculation, conjecture or assertions made in affidavits or questioning transcripts, in the absence of detailed facts and supporting evidence, should be given little or no weight and cannot establish a genuine issue requiring a trial: **Fitzpatrick** at para 23; **Wetaskiwin Animal Clinic Ltd v Hartley**, 2021 ABQB 144 at para 41; **Murray v Ford Motor Company of Canada**, 2020 ABQB 729 at para 103; **Rudichuk QB** at paras 16-17 and 21; **Clark Builders** at para 157; **County of Vulcan** at para 81; **Stankovic v 1536679 Alberta Ltd**, 2019 ABCA 187 at para 46; **ANC Timber** at paras 32 and 98; **Goodswimmer** at paras 38-45; **Malhotra v 1743134 Alberta Ltd**, 2017 ABQB 34 at para 32; **Shefsky v California Gold Mining Inc**, 2016 ABCA 103 at para 113; **Brookfield** at para 18; **Rau v Edmonton (City)**, 2015 ABCA 5 at para 19; **R Floden Services Ltd v Solomon**, 2015 ABQB 450 at para 23; **Guarantee Co of North America v Gordon Capital Corp**, 1999

CanLII 664 (SCC), [1999] 3 SCR 423 at para 31; *Attila Dogan* at para 52; *Minex Minerals Ltd v Walker*, 2019 ABQB 460 at para 148; *Pyrrha Design Inc v Plum and Posey Inc*, 2016 ABCA 12 at para 22; *Kudzin v APM Construction Services Inc*, 2023 ABKB 425 at para 121; *Spady* at para 57.

[97] Fifth, the court will assume that each party has put their best foot forward and presented all the relevant evidence for the application: *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 19 [*Lameman*]; *Weir-Jones* at para 37; *Bilg v Unifund Assurance Company*, 2015 ABQB 779 at paras 29, 59; *Milavsky v Milavsky*, 2011 ABCA 231 at para 16; *Beier v Proper Cat Construction Ltd*, 2013 ABQB 351 at paras 67, 70; *Mraiche Investment Corporation v McLennan Ross LLP*, 2012 ABCA 95 at para 5; *Grivicic v Alberta Health Services (Tom Baker Cancer Centre)*, 2015 ABQB 811 at para 12; *Axcess Mortgage Fund Ltd v 1177620 Alberta Ltd*, 2018 ABQB 626 at paras 42, 43; *Van Grinsven* at paras 60, 108; *Amik Oilfield Equipment & Rentals Ltd v Beaumont Energy Inc*, 2018 ABCA 88 at para 8; *Pyrrha Design* at paras 23, 26; *Merritt v Tigercat Industries*, 2016 ONSC 1214 at para 28; *Tagg Industries v Rieder*, 2018 ONSC 5727 at para 11.

[98] Thus, while a party is not required to question on affidavits, and while the court is not bound to accept evidence that has not been the subject of cross-examination, a party's failing to question on admissible evidence runs the risk that the evidence will effectively be unchallenged or uncontradicted for the purposes of the application, which may detract from the strength of the other party's case: *Spady* at para 67; *R v Hobbs*, 2020 ABCA 156 at para 25; *1216808 Alberta Ltd (Prairie Bailiff Services) v Devtex Ltd*, 2014 ABCA 386 at para 33; *Sticks and Stones Communications Inc v Hole's Greenhouses & Gardens Ltd*, 2015 ABQB 774 at paras 58-61; *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137 at paras 73-77; *Drummond*, at para 24.

[99] Similarly, a respondent to a summary judgment application chooses what evidence it wishes to adduce and is not obligated to file a response affidavit or to address every point of evidence of the applicant: *Weir-Jones* at para 35; *Kudzin* at para 174. However, a respondent that fails to respond to or address admissible evidence in their responding evidence runs the risk that the court will infer that the responding party does not have contradictory evidence and the applicant evidence will be accepted as unchallenged or uncontradicted.

[100] Sixth, even if there remain conflicts in the evidence after these principles are applied, this does not necessarily end the inquiry. Courts have tools to assist their assessment of whether conflicting evidence raises a genuine issue requiring trial. For example, courts may, in appropriate cases:

- (a) find that the conflict is not really factual but rather a conflict of the litigants' opinions or positions: *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 at para 81, leave denied, 2015 CanLII 52181 (SCC);
- (b) draw inferences based on admitted facts, undisputed evidence, the conduct of the parties, and corroborating evidence (such as documents with objective reliability): *Goodswimmer* at para 39; *Weir-Jones* at paras 21, 38 and 63; *Rudichuk QB* at para 31; *Malhotra* at para 31; *Guarantee Co* at para 30; *Lameman* at para 11. Inferences

must be reasonable, and they must be based on proven facts, and in considering whether to draw the invited inference the trier of fact must also consider other reasonable or plausible theories “based on logic and experience”, not speculation: **Lameman** at para 11; **Guarantee Co** at para 30; **Haack** at para 112; **R v Villaroman**, 2016 SCC 33 at para 23; **Axxcess Mortgage** at paras 173, 188; **Sticks and Stones** at para 32;

- (c) resolve issues based on the portions of the affidavits that are not in dispute, where appropriate, including because the conflicting evidence is not on an essential element of the claim or defence or not material to the outcome: **Sandhu** at para 81; **Minex** at para 147; **Seymour Resources Ltd v Hofer**, 2004 ABQB 303 at para 20; **Lydian Properties Inc v Chambers**, 2009 ABCA 21 at para 22-23; **Malhotra** at para 31;
- (d) balance the weight and perceived reliability of evidence because it is inconsistent with the balance of the record or the litigation history: **Goodswimmer** at para 40; **Shefsky** at para 113; **Dagher v Glenn**, 2016 ABCA 38 at paras 30-32; and
- (e) assume as true the relevant facts asserted by the party opposing summary judgment and determine whether the law permits judgment on those facts, including because those assumed facts do not support that party’s claim or defence: **Weir-Jones** at para 38; **Arndt v Banerji**, 2018 ABCA 176 at para 36(b); **Goodswimmer** at para 40; **Sherwood Steel v Odyssey Construction**, 2014 ABCA 320 at para 8; **776826 Alberta Ltd v Ostrowercha**, 2015 ABCA 49 at para 10; **Third Eye Capital Corporation v Tobber**, 2022 ABQB 536 at para 5; **O’Mhaoigh v United Safety International Ltd**, 2020 ABQB 672 at para 14; **Lydian Properties** at paras 2, 22-23.

[101] In the context of wrongful dismissal cases, courts¹ have used these evidentiary principles and tools in the context of the **McKinley** framework and have granted wrongful dismissal plaintiff-applicants summary judgment, even in the face of just cause defences, where:

- (a) the employer did not provide evidence of particulars of the alleged just cause: **Kubersky v Pomeroy (Pomeroy Group)**, 2021 ABQB 173 (Master) (**Kubersky-Master**) at para 43 affirmed in **Kubersky v Pomeroy Hospitality Ltd**, 2021 CarswellAlta 3387 (**Kubersky-Justice**) at paras 21-22); **Hinke v Thermal Energy**, 2011 ONSC 5345 13-22; **Merritt** at para 26;
- (b) if the employer’s alleged conduct is accurate or assumed as accurate, the employer failed to provide or document a required warning or condoned the conduct: **Bomford v Wayden Transportation Systems Inc**, 2010 BCSC 1506 at paras 6-7; **Duxbury v Crook**, 2018 SKQB 353 at para 26 affirmed 2020 SKCA 43 at para 6; **Seykora v Rural Municipality of Lake Lenore #399**, 2019 SKQB 225 at para 9; **Jasnoch v Provincial Plating Ltd**, 2000 SKQB 44 at para 18; **Grant v Electra Sign**

¹ Some of these cases involve jurisdictions where courts have additional specific evidentiary powers in summary judgment applications that are not specifically present in the *Alberta Rules*, however, in many of the cases I have noted the courts did not rely on those specific powers.

Ltd, 2016 MBQB 131 at paras 45-47, affirmed 2018 MBCA 5; *Volpé v Province of NB*, 2017 NBQB 109 at paras 41-42; 59; *Tagg Industries* at para 27; and

- (c) if the employer's alleged conduct is accurate or assumed to be accurate, it is not conduct that would support summary dismissal of the employee: *Carr v Fama Holdings Ltd*, 1989 CanLII 240, 63 DLR (4th) 25 (BCCA) at 8-9; *Caudle v Louisville*, 1999 SKQB 276 at paras 19-21; *Grant v Electra* at para 48; *Sinnathamby v The Chesterfield Shop Limited*, 2016 ONSC 6966 at paras 112-13; *Tagg* at para 29; *Cuconato v Parker Auto Care Ltd*, 2018 ONSC 2803 at paras 23, 25 ; *Volpé* at para 65 *Johar v Best Buy Canada*, 2016 ONSC 5287 at para 24.

[102] I now turn to the record in this case.

c. The Evidentiary Record for Sproule's Just Cause Defence

[103] I have screened the affidavit evidence and Transcript pursuant to the principles noted above, to disregard inadmissible or inappropriate evidence. Even after doing so, credibility issues and significant evidentiary conflicts remain on numerous matters, including McDonald's alleged conduct and performance.

[104] In these circumstances, to determine whether there is a genuine issue requiring trial, I must disregard McDonald's evidence where there are disputed material facts and assume Sproule's evidence is correct. Further, given the credibility issues, and given that McDonald did not question on the Sproule Affidavits, I disregard McDonald's evidence on any contentious material facts even where Sproule's witnesses did not specifically address them. Effectively, to determine whether there is a genuine issue requiring trial, I must assume Sproule's best case and only consider Sproule's admissions in the Defence, agreed facts, McDonald's unchallenged evidence on non-contentious matters, McDonald's admissions against his interest from his questioning, and Sproule's evidence on disputed material facts.

[105] A summary of such admissions and evidence is set out below (recognizing that McDonald disputes much of the following):

- (a) in the early 1980s, McDonald obtained his commerce degree and became a chartered accountant. He worked with accounting firms until he joined Sproule as its Controller in December 2003. In 2010, his title changed to Chief Financial Officer (**CFO**). There is no evidence that Sproule had any written job descriptions for McDonald's roles. There is no evidence of any issues with McDonald's conduct or performance prior to 2014;
- (b) in September 2014, a Sproule employee complained to Sproule's President, Helwerda, alleging harassment and bullying by one of McDonald's direct reports (**Paulson**). Sproule retained Cade to conduct an initial investigation of all HR/Administration Staff. Cade confirmed Paulson's serious bullying to Helwerda, Carsted and Van De Veen. She did not interview McDonald but reported that staff noted McDonald did not address the reported bullying and was defensive, dismissive, and controlling;

- (c) McDonald was not involved in the investigation. Helwerda, Carsted and Van de Veen met with McDonald to discuss Cade's report (**October 2014 Meeting**). McDonald denied being approached about the bullying. McDonald became angry, disagreed with and would not discuss Cade's findings, was against terminating Paulson for cause, expressed unwillingness to support Cade's recommendations, called Helwerda, Carsted and Van de Veen "stupid", said that they did not understand how women interacted, that he had more experience with respect to these issues, and proposed that he should conduct an interview of all of the staff in order to come up with a solution to the problem complained of;
- (d) Sproule decided that McDonald should also be terminated based on his conduct at the October 2014 Meeting, but he was not because the next day he apologized for his behaviour and confirmed his support for terminating Paulson. McDonald was advised at the time he was being given a second chance with the hope his behaviour would change. McDonald undertook to change his behaviour going forward. Paulson was terminated for cause on October 31, 2014. McDonald's father died within two weeks of Paulson's termination;
- (e) in 2014, McDonald was asked to prepare financial statements for Sproule's subsidiaries (**Financial Statement Request**), which he had not satisfactorily completed by June 2015. There is no direct or detailed evidence that Sproule specifically raised this issue with McDonald or warned him about it;
- (f) in a November 2014 with the Board and its audit committee to discuss Sproule's share structure, McDonald was very dismissive of the Board and audit committee's ability to understand some complicated calculations. There is no direct or detailed evidence that Sproule specifically raised this issue with McDonald or warned him about it;
- (g) McDonald was not the lead on some business modelling and share valuation modelling work Sproule conducted from mid April 2014 to April 2015, as part of Sproule's efforts to grow its international consulting business. Gunnewiek, as Chair of the Board, was of the view that this illustrated McDonald's inability to perform at the CFO level, but there is no direct or detailed evidence that Sproule specifically raised this issue with McDonald or warned him about it (other than possibly at his June 2015 performance review (**Performance Review**));
- (h) in 2015, the executive group was concerned about McDonald's attitude and behaviour because some of them had been informed that McDonald had continued to express, to Sproule staff including subordinates, his disagreement with the decision to terminate Paulson. At least partly because of McDonald's conduct, in May 2015 Sproule retained Cade to survey staff and conduct group staff training (**May 2015 Training**). McDonald was reluctant to participate but did so at Helwerda's insistence, but in Cade's view he was closed, dismissive, sarcastic, displayed apparent defiance, and left her the impression he was not willing to lead as an executive. She reported to Sproule management that McDonald had an attitude challenge;

- (i) in June 2015, Helwerda conducted McDonald's annual Performance Review. Helwerda rated McDonald's overall job performance as "above average", but also provided specific feedback: (1) he would like McDonald to be more engaged in meetings/seminars so that he does not portray himself as being disinterested, non-supportive and not a team player; (2) McDonald did not command the respect of his peers; (3) as a member of the executive, he needed to be unified on all executive decisions (with specific reference to the Paulson termination); (4) McDonald's sarcastic remarks to direct reports are not well received; and (5) McDonald needs "to be of [sic] a CFO rather than a lead accountant"; McDonald "does the basics and I need him to be more innovative". McDonald disagreed with all the comments and refused to sign the performance appraisal. There is no evidence that McDonald was given a warning that if any of the feedback items from the Performance Review were not addressed, or that if he did not sign the Performance Review, McDonald's employment was at risk of termination;
- (j) in October 2015, Gunnewiek asked McDonald to prepare a summary of Sproule's insurance coverage and to conduct a gap analysis (**Insurance Request**). When Gunnewiek followed up in January 2016, McDonald responded that the insurance was adequate and that McDonald was too busy to provide a summary. There is no direct or detailed evidence that Sproule raised this issue with McDonald or warned him about it;
- (k) at a Board meeting (**October 2015 Board Meeting**): (1) in response to a question about a project deliverable that was outstanding, McDonald stated that Gunnewiek was deliberately trying to embarrass McDonald; (2) McDonald was unable to answer several questions that required follow up and became defensive; and (3) when presenting the 2015 audited financial statements, McDonald highlighted the increased expense of the independent directors (including Gunnewiek) but did not provide a report (**KPMG Review**) that praised the Board and management;
- (l) at a Board meeting (likely the October 2015 Board Meeting), in response to questions, McDonald told Gunnewiek or the Board something along the lines of "you mind your business and I will mind my business". Also at a Board meeting, McDonald stated "I don't want to be here" with his arms crossed and an unhappy demeanour. There is no direct or specific evidence Sproule raised these specific comments or behaviour or warned McDonald about them. There is no evidence that McDonald ever failed to attend a Board meeting he was required to attend;
- (m) at the November 2015 annual general meeting (**AGM**) of Sproule's employee shareholders, McDonald presented the audited financial statements, but failed to present or circulate the KPMG Review. However, there is no direct or specific evidence that he was asked or authorized to provide the KPMG Review to shareholders. There is no specific evidence Sproule raised this issue with McDonald or warned him about it;
- (n) in addition to the Financial Statement Request and the Insurance Request, Gunnewiek provided evidence of his concerns over McDonald's inability or refusal

to prepare, provide or explain financial reporting information, including financial forecasting, business modelling, Class D share reporting, shareholder capital calculation, share structure, and his inability to explain financial matters at Board meetings. There is also evidence of concerns about McDonald's failure to implement, update or use appropriate financial systems, including in relation to online banking, cheque deposits and cash management. Gunnewiek's conclusion was that McDonald was set in his ways, was resistant to change, and lacked operational transparency such that Gunnewiek considered McDonald to be a high risk to Sproule's sustainable operations. Other than as might be included in the Performance Review feedback, there is no specific evidence Gunnewiek or Sproule specifically raised these performance issues and concerns with McDonald or warned him about them;

- (o) Gunnewiek spoke to McDonald about the necessity of ensuring that the accounting department would continue to function if something were to happen to McDonald (**Succession Protocol**). McDonald was encouraged and directed to create a Succession Protocol, but it was not prepared by the date of his termination. There is no evidence as to when this request was made, when it was requested to be completed, or of any warning of the consequences if it was not completed;
- (p) at the November 2015 AGM, Sproule announced a corporate reorganization (**Reorganization**). Prior to the AGM, Helwerda explained the new structure to McDonald and the reasons for it, including Helwerda's concerns that McDonald was not performing the role of CFO. Helwerda explained that McDonald's title was changing to Controller and he would now be reporting to Van de Veen as Senior Vice President of Corporate Services and Legal. McDonald was disappointed and refused to acknowledge the criticism, asserted he was performing his role, and that the change of title was constructive dismissal.² McDonald refused to accept Van De Veen as his direct supervisor and was not prepared to change. McDonald was advised that he was required to acknowledge the new structure and report accordingly;
- (q) Sproule had a bonus policy. Bonuses were at the discretion of Sproule's executive and according to Sproule's financial position. The policy described that the bonus "will reflect the Executive's assessment of each individual during the past fiscal year" in the areas of "contribution, management, marketing and attitude." The bonuses were determined by the Board after the audit following the end of the fiscal year and McDonald would receive a list of the bonuses. Therefore, sometime in fall 2015, the Board approved a FY2015 bonus for McDonald of \$93,570 (38% of his salary). McDonald's questioning evidence was that this was likely determined in December 2015, but Sproule's witnesses provided no evidence of the precise date the bonus was declared or announced. The FY2015 bonus was less than his bonuses for FY2013 (\$197,681.64) and FY2014 (\$253,055.07). There is no evidence that

² McDonald's Statement of Claim does not plead or allege that he was constructively dismissed.

McDonald was provided any reasons for why he was given a FY2015 bonus or why it had decreased from previous years;

- (r) on December 8, 2015, Van de Veen met with McDonald (**December 2015 Meeting**) to discuss his role and their interaction moving forward. McDonald advised Van de Veen that Van de Veen's involvement would not be welcome, and that McDonald had been successfully managing his team for many years. McDonald also advised that Helwerda had told McDonald that Van de Veen's position was just a box that needed to be filled to validate the new structure. McDonald's view was that his continued employment was predicated on his own version of how the new structure would work and his reporting relationship remaining the same. Van de Veen advised McDonald that "it would be good to rethink his attitude going forward" (**December Advice**);
- (s) following the December 2015 Meeting, McDonald stayed on as Controller. There is no evidence as to whether or how McDonald's roles and responsibilities changed with the title change. Sproule admits in its Defence that, at McDonald's insistence, as Controller, McDonald continued to meet with Helwerda on a weekly basis to provide him with an update on any significant accounting matters. After the December 2015 Meeting, there is no specific evidence of McDonald failing to meet with or report to Van de Veen, or of Sproule specifically raising, or warning McDonald about, a failure to recognize the Reorganization;
- (t) in 2015, without obtaining advance authorization, and unbeknownst to management and the Board, McDonald engaged KPMG to work on a Sproule shareholder tax savings project (**Tax Savings Project**) and incurred \$50,000 without Board approval. The Tax Savings Project was presented at the December Board 2015 meeting and McDonald endorsed its recommendations. The Board did not approve the recommendations. There is no evidence of McDonald's spending authority or whether the Tax Savings Project fell outside the scope of his duties. There is no direct or specific evidence of Sproule specifically raising, or warning McDonald about, his conduct with respect to the Tax Savings Project;
- (u) in addition to the specifics noted above, there is generalized evidence that McDonald's behaviour in Board meetings starting in about October 2015 became increasingly belligerent, combative, disrespectful, indifferent, despondent, disconnected, disruptive, critical of management, and non-responsive, and was deteriorating over the fall 2015. Van de Veen was told and believed that both Helwerda and Gunnewiek were going to speak to McDonald about his conduct at Board meetings, but neither of them provided any specific evidence of doing so until Helwerda met with McDonald in January 2016 (described below). There is no evidence that Sproule specifically raised, or warned McDonald about, his conduct at Board meetings between the time of the Performance Review and Sproule's January 2016 board meeting (**January 2016 Board Meeting**);
- (v) at the January 19, 2016, Board Meeting, McDonald acted with "intransigent and insubordinate behaviour through his mood and body language". No other specifics

were provided about McDonald's behaviour at that meeting, but McDonald did not deny that he crossed his arms, scowled and was negative at that meeting, or that he was followed up with after the meeting;

- (w) Helwerda followed up with McDonald on January 20, 2016 (**January 20 Meeting**) to find out why McDonald behaved the way he did and to suggest that his behaviour would not be accepted. McDonald told Helwerda that McDonald did not want to attend Board meetings and he feared being embarrassed by Gunnewiek;

- (x) at the January 20 Meeting, Helwerda stated the following (**January Advice**):

I also informed Mr. McDonald that I could possibly be stepping down from the President's role sooner than he may have anticipated (although no formal announcement had been made) and that the current Chairman of the Board, [Gunnewiek], could possibly become the next President and CEO. I advised McDonald that in his own best interest it was important for him to change his attitude and his insubordinate behaviour and begin acting in a more professional manner especially in his interactions with [Gunnewiek]...

- (y) there is no evidence of McDonald's conduct between the January 20 Meeting and his February termination about three weeks later. For example, there is no evidence as to whether he ever attended another Board meeting or had any further dealings with Board members;
- (z) on February 10, 2016, the Board unanimously agreed to terminate McDonald. The Board considered whether to terminate McDonald for cause and, for a variety of reasons, decided to terminate him for cause;
- (aa) on February 11, 2016, McDonald was terminated. He met with Gunnewiek, Helwerda, Carsted and Sproule's Chief Operating Officer. He was either requested or provided the opportunity to resign and was presented paperwork for his resignation. He did not resign and was terminated for cause. There is no evidence that the reasons for his termination were explained at the meeting, or in the termination letter he was later provided on February 16, 2016;
- (bb) after the termination meeting, the Sproule executives left and McGrath met with McDonald. McDonald made inappropriate and threatening comments toward Sproule and Helwerda in particular, which caused Sproule to contact the police. McDonald spoke to other Sproule directors or employees as he was leaving or on the street after he left, and told them about a study he had made about the lack of net financial contribution of Sproule's executives; and
- (cc) after McDonald's termination, Sproule reviewed its accounting practices to make the accounting group more efficient and identified and immediately implemented improvements. Sproule also retained an independent consultant to review Sproule's

financial records including its share structure and share payments to ensure all monies were properly accounted for and to support Sproule's new VP Finance in understanding Sproule's complicated financial structure and accounting processes.

[106] I now turn to apply the **McKinley** proportionality framework using these facts to see if Sproule's just cause defence raises any genuine issues for trial.

d. In Light of the Record, Does Sproule's Just Cause Defence Raise Genuine Issues Requiring a Trial?

i. The Nature and Extent of the Misconduct

[107] The undisputed and assumed record illustrates two broad problems with McDonald's conduct: first, deteriorating performance and incompetence and, second, an attitude problem.

[108] With respect to his performance and competence, there were concerns about whether he was able or willing to perform the CFO role. Although he did not have a written job description to compare his performance to, these concerns were sufficiently present to warrant mention in his Performance Review and, based on Sproule's evidence, the performance concerns grew over the latter half of 2015. At the same time, McDonald continued to attend Board meetings and make his presentations. Further, by at least May 2015 concerns existed over his ability to be a senior executive, leader, and manager, and this was specifically raised in his Performance Review. Taken alone, and accepting Sproule's evidence, McDonald's deteriorating performance and competence was becoming increasingly serious. The undisputed and assumed record is sufficient for me to find that McDonald objectively displayed poor performance and some incompetence in his role as CFO.

[109] An issue with McDonald's attitude first appears in the record in October 2014 with his reaction to being told about Cade's conclusions that Paulson was bullying McDonald's staff – this issue was flagged by Cade, and then addressed in part in McDonald's June 2015 Performance Review. Based on Sproule's evidence, McDonald did not accept the feedback and his attitude became worse, particularly in his dealings with his direct supervisors and the Board. As noted in the Sproule witnesses' robust list of problematic adjectives describing his conduct, McDonald became difficult and disrespectful, and at the same time indifferent or non-responsive about his role in the fall of 2015. The undisputed and assumed record is sufficient for me to find that McDonald's pre-termination conduct was, at least at times, insolent and insubordinate as defined in the case authorities noted earlier.

ii. The Surrounding Circumstances

[110] This part of the analysis requires the Court to look at the situation from both the employee and the employer's perspective.

[111] From McDonald's perspective, he had been an important member of Sproule's executive team for a long time. Until 2014, there is no evidence of any issues with his performance and, in fact, he had been receiving significant discretionary bonuses leading up to his termination. He was disappointed by the Reorganization, had expressed concerns to Helwerda about being afraid that

Gunnewiek would embarrass him at Board meetings, and did not want to attend Board meetings but continued to do so.

[112] From Sproule's perspective, McDonald was a senior financial executive that they were concerned had ignored or facilitated unacceptable bullying. He reacted poorly to that information and did not initially or consistently support the decision to terminate Paulson. There was concern that he was undermining that decision with subordinates or otherwise criticizing management decisions. At the same time, his performance was deteriorating or sub-standard and he seemed unable to perform at the CFO level that Sproule desired. Concerns surfaced about his lack of transparency. His attitude was an ongoing problem. Sproule changed his title to Controller to reflect what it believed was a better fit with his performance, which disappointed McDonald and did not improve his attitude – his attitude, insolence, and insubordination got worse and culminated in the January 2016 Board Meeting.

[113] Based on the legal framework discussed earlier, the direct or indirect communication by the employer to the employee about the employee's misconduct is also a critical component of the surrounding circumstances in the **McKinley** framework. Accepting Sproule's evidence and interpreting the record most favourably to Sproule, the record displays serious shortcomings in Sproule's communication and conduct toward to McDonald:

- (a) McDonald's response to Cade's report about Paulson was sufficiently serious that Sproule was going to terminate him, but gave him a second chance after he apologized. His attitude worsened through the fall and into May 2015 with the May 2015 Training, and there were some markers about his performance as CFO. However, the Performance Review, as the only documented review of his performance in the record, objectively sent him the message that he was performing above average and only gave him feedback on some matters he needed to improve on. The Performance Review: (1) effectively condoned (or further condoned) his behaviour and performance except as specifically otherwise mentioned; (2) was not clear in some instances about what level of job performance was being suggested or required, or what exactly he needed to improve; (3) was not a warning that the failure to meet a standard or improve his performance would or could result in his dismissal. McDonald's performance was further condoned and approved by issuing him a significant financial bonus for FY2015 later in 2015;
- (b) from July to November 2015, there is increasing evidence of dissatisfaction at Sproule and its Board (and Gunnewiek in particular) about McDonald's performance as CFO. Yet there is no documented, direct, or specific evidence of Sproule advising McDonald specifically what he needed to do to improve, or warning him about his performance as CFO as instances of non-performance or incompetence arose (or at all);
- (c) in the Reorganization, Sproule objectively sent the message that McDonald's employment was confirmed, but in a new role with less responsibility or seniority. Sproule did not take that opportunity to reset Sproule's expectations or to document McDonald's job responsibilities. Further, there is no documented, direct, or specific evidence that the title change was accompanied by a warning that his employment

was in jeopardy if he did not perform in the new role. Rather, the Reorganization objectively recalibrated his job to match his performance. There is no evidence that McDonald did not meet the Controller job requirements or that his performance after the title change was unsatisfactory or incompetent (aside from attitude issues) or that he was unable to perform the undocumented Controller duties;

- (d) while the FY2015 bonus was for the period ending June 2015, the declaration of a significant discretionary bonus in the fall of 2015 was objectively, and most likely, further condonation and approval of McDonald's performance in the areas of "contribution, management, marketing and attitude" as per Sproule's bonus policy;
- (e) with respect to McDonald's attitudinal issues, insolence, or insubordination, from the Performance Review to the December 2015 Meeting, there is no documented, direct or specific evidence that Sproule or its Board raised their concerns about his behaviour with him when the issues arose or gave him any warnings. On the record, Sproule condoned his behaviour for months. Van de Veen's December Advice that it would be good for McDonald to rethink his attitude going forward was vague, was not a clear warning that his employment was in jeopardy, and it was objectively in the context of McDonald's response to the Reorganization and the new reporting structure at Sproule, not his dealings with the Board or other attitudinal concerns. Gunnewiek does not testify to giving McDonald any warnings or reprimands during this period. Carsted's conclusory statement that McDonald was given a "very stern warning" is not attributed to any person or timeframe and is not supported by other evidence. Helwerda's conclusory statement to McDonald having been "made aware on several occasions" as to McDonald's need to change his attitude and behaviour is also not specific and only points to the particulars elsewhere in his affidavit. Nowhere in Helwerda's affidavit does he discuss making McDonald aware of a need to change his attitude or behaviour between the Performance Review and the January Advice;
- (f) McDonald's behaviour at the January 2016 Board Meeting, alone or in the cumulative context, was serious enough to warrant immediate employer action. And Sproule intervened by having Helwerda speak to him the next day;
- (g) Helwerda's January Advice is critical to the surrounding circumstances of the termination, and is problematic for Sproule's just cause defence for several reasons;
 - (i) the January Advice was not a clear warning that his employment was in jeopardy. The reference that it was in McDonald's best interest to "begin acting" differently, to change his attitude and insubordinate behaviour, did not clearly state what the consequences of failing to do so were. Further, it did not make it clear whether Helwerda was only referring to conduct from the January 2016 Board Meeting or other earlier conduct as well;
 - (ii) the January Advice, viewed objectively, actually *confirmed* McDonald's employment. By implying that McDonald *may* be at risk *if* Gunnewiek became President, the corollary implication is that he was *not* at risk of

being terminated if Gunnewiek did not become President. Put another way, this would have objectively suggested to McDonald that, at that time, McDonald's relationship with Sproule had not reached the point where the relationship could not carry on, but it *might* in the future *if* Gunnewiek became President. This also would have objectively suggested to McDonald that the issue was not necessarily McDonald's attitude or ongoing relationship with Sproule, but with Gunnewiek personally; and

- (iii) even accepting that the January Advice was a clear warning that put McDonald's employment was at risk if he did not change his ways, McDonald was terminated three weeks later and Sproule did not adduce evidence about McDonald's conduct from the January 20 Meeting until his termination, or whether he was even given a chance to improve his attitude with the Board.

[114] Sproule relied on McDonald's conduct after he was terminated to support just cause, but this does not form part of the surrounding circumstances to his termination.

iii. Was Dismissal a Proportionate Response?

[115] Based on the undisputed and assumed record, the termination was not a proportionate response to McDonald's conduct, for the reasons set out below.

[116] McDonald's performance and conduct were certainly becoming serious, but over that same period he was sent positive messages about his performance, given feedback of things to work on, issued a significant bonus, redesignated as Controller, and later told it would be a good idea to change his attitude. After his inappropriate conduct at the January 2016 Board Meeting, he was not terminated, but then was immediately warned to "begin acting" differently and that, at some undescribed point in the future, his employment *might* be at risk if Gunnewiek became President and McDonald did not improve his relationship with Gunnewiek.

[117] In all the circumstances, I find that, on this undisputed and assumed record, termination was not a proportionate response to either his performance issues or his attitudinal issues, whether taken alone or considered together.

[118] With respect to his performance, the new Controller role had only begun in late 2015 and, if there were issues, a proportionate response would require a description of expectations, which expectations were not being met, and then facilitating his improvement, including providing him time to address the feedback and improve. I find that Sproule's evidence of what it discovered about McDonald's performance following his termination, even if fully accepted and assumed to have existed at the date of termination, does not materially change this conclusion.

[119] With respect to his insolent or insubordinate behaviour, the January Advice confirms matters had not yet reached the level of seriousness such that his employment as Controller could no longer viably subsist, that his conduct was not reconcilable with sustaining the employment relationship, or that the relationship had broken down or was destroyed. Sproule chose *not* to terminate him but instead gave him a vague reconfirmation of his employment with, at best, a conditional warning about Gunnewiek. Then, about three weeks later the Board decided to

terminate him without providing any reasons to him, in the absence of any new evidence of misconduct, and without giving him a reasonable opportunity to address the concerns raised in the January Advice, including improving his relationship with Gunnewiek. A proportionate response following the January 2016 Board Meeting required something less than termination, including a clear warning, an indication of expectations, confirmation that his employment was at risk if he did not address expectations or concerns, and an opportunity to adjust his attitude. That was not done.

[120] Accordingly, I find that, even assuming Sproule's evidence and interpreting it most favourably to Sproule, there is no merit to its just cause defence and, therefore, Sproule has not established a genuine issue requiring a trial.

e. Is it Possible to Summarily Resolve McDonald's Claim and, if so, is the Court prepared to Exercise its Judicial Discretion to do so?

[121] For expediency, and given my earlier analysis, I have considered together the first and last of the considerations outlined in paragraph 47 of *Weir-Jones*.

[122] I have found that McDonald discharged his threshold burden, and Sproule has not discharged its burden to establish a genuine issue for trial on its just cause defence. However, as a check on the process, I consider whether it is possible and appropriate to fairly resolve McDonald's claim against Sproule summarily. I am mindful that one the key considerations is procedural fairness: *Hannam* at para 161.

[123] Given the nature and presentation of the evidence, this has been a complex application to review. However, a voluminous or complex record does not necessarily mean summary disposition is inappropriate. Courts have been encouraged to make findings of fact and resolve cases summarily where appropriate to do so.

[124] I have been alive to the conflicts in the evidence and the potential fact-finding difficulties and credibility issues that they can cause, which can be markers that summary judgment is not appropriate: *Weir-Jones* at para 38. However, I have determined that resolving the conflicts, or whether McDonald or the Sproule witnesses are more honest or reliable, is not necessary to resolve the claim or the just cause defence.

[125] There will be little utility, and significant delay and expense, requiring this matter to proceed to trial. The amount at issue is undoubtedly significant for the parties, but the claim is already 7 years old. The parties have expended significant resources on this action (already going to the Court of Appeal on a procedural issue) and on this Application. Trial litigation costs will be significant. Sproule is properly concerned about failing memories, loss of evidence and availability of witnesses that are no longer in its control.

[126] Further, Helwerda's death means that there is unlikely to be a better record at trial in respect of any of his one-on-one conversations with McDonald, including in respect of the Performance Review and the critical January 20 Meeting in which Helwerda gave the January Advice.

[127] I am satisfied that Sproule has had a fair process and opportunity both to know the case against it, to comprehensively test McDonald's case in a 500+ page Transcript, and to put its best foot forward to adduce response evidence to attempt to establish a genuine issue requiring a trial.

[128] Accordingly, it is possible and appropriate to exercise my discretion to resolve McDonald's claim summarily. For the reasons above, I find that Sproule did not have just cause to terminate McDonald without notice and McDonald is entitled to damages.

B. Is it Possible and Appropriate to Determine Damages Summarily?

[129] As McDonald was wrongfully dismissed, and there was no contractual limitation on notice, he was entitled to reasonable notice or payment of damages in lieu of notice: *Matthews* at para 38 and 43; *Keays* at para 50. The remedy for breach of the implied term to provide reasonable notice is an award of damages based on the period of notice which should have been given, with the damages representing "what the employee would have earned in this period": *Matthews* at para 49; *Wallace v United Grain Growers Ltd*, 1997 CanLII 332 (SCC), [1997] 3 SCR 701 at paras 65-67; *Carroll v ATCO Electric Ltd*, 2018 ABCA 146 at para 18.

[130] Sproule argues that, if the court decides McDonald was dismissed without cause, "a further hearing will be required in connection with the issue of damages" but does not say why or whether that meant a trial. McDonald's application was for summary judgment, including damages, and Sproule was obligated to put its best foot forward to establish a genuine issue requiring trial in respect of damages: *Geophysical Service Incorporated* at para 14.

[131] I address below four main areas in considering whether it is possible and appropriate to summarily resolve damages, or whether there are genuine issues requiring a trial: (1) determination of the notice period; (2) Sproule's mitigation defence; (3) calculation of McDonald's damages for wrongful dismissal and (4) McDonald's claim to additional damages for Sproule's alleged bad faith conduct.

1. Is it Possible and Appropriate to Summarily Determine the Notice Period?

a. The Nature of the Implied Term Requiring Reasonable Notice

[132] As noted earlier, the common law implies a term of the employment contract to provide reasonable notice, failing which the employee is entitled to damages: *Matthews* at paras 38 and 43; *Keays* at para 50. That is, the common law "implies a term of reasonable notice, or pay in lieu": *Styles v Alberta Investment Management Corporation*, 2017 ABCA 1 at para 34.

[133] The purpose of the implied term of reasonable notice is to enable the terminated employee to obtain other employment: *Lavallee v Siksika Nation*, 2011 ABQB 49 at para 116, citing *Bramble v Medis Health & Pharmaceutical Services Inc*, 1999 CanLII 13124 (NBCA), 2014 NBR (2d) 111 at para 57 (NBCA); *Steinebach v Clean Energy Compression Corp*, 2016 BCCA 112 at paras 15-17; *Sumner v PCL Constructors Inc*, 2010 ABQB 536 at para 12. Therefore, at its heart, the period of reasonable notice attempts to estimate, as of the date of termination, the time period it will take the employee to find commensurate employment: *Alberta Computers.com Inc v Thibert*, 2021 ABCA 213 at para 60; *Humphrey v Mene Inc*, 2022 ONCA 531 at para 48.

[134] The calculation of reasonable notice is *not* a calculation of damages, but rather is a question of interpretation and determination of the implied term of contractual notice required: **Carroll** at para 17; **Baker** at para 25. This means it is a question of mixed fact and law governed by the Supreme Court of Canada's approach to contractual interpretation in **Sattva Capital Corp v Creston Moly Corp**, 2014 SCC 53 at para 50; **Carroll** at para 17.

[135] The determination of the reasonable notice period is highly fact dependent: **Carroll** at paras 20-21 and 40. Courts continue to generally apply a non-exhaustive list of factors, including the character of the employment, length of service, age, availability of similar alternative employment, having regard to the employees experience, training and qualifications: **Alberta Computers.com** at para 60; **Wallace** at paras 81-82, citing **Bardal v Globe & Mail Ltd**, 1960 CanLII 294 (ONSC), (1960), 24 DLR (2d) 140 (Ont HC); **Keays** at paras 25, 28-32.

b. Is Determining the Reasonable Notice Period Appropriate for Summary Judgment Generally?

[136] In Alberta, there are conflicting authorities as to whether it is appropriate for courts to determine the reasonable notice period in a summary judgment application. In **Coffey v Nine Energy Canada Inc**, 2018 ABQB 898, a Justice of our court held it was not appropriate for courts to determine the notice period in a summary judgment application because the determination of the notice period involves the weighing of evidence and the determination of a question of fact. This aspect of **Coffey** has not yet been expressly interpreted by another Justice of this Court or the Court of Appeal, however it has been described as leaving the law in an unsatisfactory state from an Applications Judge's perspective: **Kubersky-Master** at para 3.

[137] I do not follow **Coffey** for several reasons.

[138] First, **Coffey** was decided before **Weir-Jones**, **Hannam** and other Court of Appeal decisions that have clarified the Alberta framework and principles in determining summary judgment. Accordingly, I am not compelled to follow **Coffey** by principles of horizontal *stare decisis*: **R v Sullivan**, 2022 SCC 19 at paras 73-75. In my view, an interpretation that effectively eliminates wrongful dismissal from summary judgment is out-of-step with those decisions, and is inconsistent with and undermines the policy behind increased access to justice and use of summary judgment in the **Weir-Jones** and **Hryniak** mandated culture-shift.

[139] Second, **Coffey** appears to have proceeded on the basis that the issue of determining the notice period is solely a question of fact. While determining the notice period is undoubtedly a factually intensive exercise, the Court of Appeal, both before and after **Coffey**, has confirmed the notice period is a question of legal entitlement akin to contract interpretation and is a question of mixed fact and law. In any event, the Court of Appeal since **Coffey** has confirmed that courts can make findings on contested material facts in a summary judgment application: **Hannam** at paras 147-148.

[140] Third, **Coffey** is out of step with earlier Master-level summary judgment jurisprudence in Alberta post-**Hryniak**: **Rajotte v National Bank Financial Inc**, 2017 ABQB 697 at para 42; **Eberle v Sunhills Mining Limited Partnership**, 2018 ABQB 389 at paras 3-5; **Engelhardt v Sunhills Mining Limited Partnership**, 2018 ABQB 383; **Toole v Northern Blizzard Resources Inc**, 2017

ABQB 760 at para 9; *Nixdorf v Broadstreet Properties Ltd*, 2017 ABQB 132; *Nutting v Franklin Templeton Investments Corp*, 2016 ABQB 669; *Harper v Lafarge Canada Inc*, 2016 ABQB 586; *O'Donnell v Soldan Fence and Metals (2009) Ltd*, 2015 ABQB 764, paras 16, 23. Further, since *Coffey*, Justice deWit (as he then was) determined a notice period summarily, although he did not specifically address *Coffey: Kubersky-Justice*.

[141] Courts in other jurisdictions have also consistently confirmed that the notice period can be determined in a summary judgment process: see, for example: *Arnone v Best Theratronics Ltd*, 2015 ONCA 63; *Asgari v 975866 Ontario Ltd*, 2015 ONSC 7508; *Johar; Merritt; Sinnathamby; Groves v UTS Consultants Inc*, 2019 ONSC 5605; *Total Credit Recovery Ltd v Martin et al*, 2020 NBCA 8; *Beatty v Best Theratronics Ltd*, 2014 ONSC 3376 affirmed 2015 ONCA 247. Notwithstanding that these courts have specific powers in their rules that we do not have in Alberta, I see no principled basis for a different categorical rule in Alberta that prohibits summary determination of reasonable notice periods.

[142] There is no reason why determination of the notice period should be treated differently than any other issue in a summary judgment application. If there are no genuine issues requiring a trial, for example where the record permits the court to make factual findings about the relevant factors in determining the notice period, there is no need for a trial to determine the notice period.

c. Is Summary Determination of the Reasonable Notice Period Appropriate in this Case?

[143] In this case, neither party argued that there were any factors in addition to the *Bardal* factors that were material in this case. In my view, there is sufficient undisputed evidence about the character of McDonald's employment, length of service, age, availability of similar alternative employment, and McDonald's experience, training and qualifications to permit the court to make factual findings and a fair and just determination of the reasonable notice period.

d. McDonald's Reasonable Notice Period

[144] At the time of his Termination, McDonald was 56-years-old and had been a chartered accountant since 1983. He had been with Sproule (or its corporate predecessors) for 12 years, first as Controller until 2010 and then CFO until late 2015 when his title changed back to Controller. He was part of Sproule's executive team in a position of seniority with responsibilities related to the accounting, finance, and human resource functions.

[145] The question of the availability of similar, alternative employment is to be assessed prospectively at the time of dismissal: *Rice v Shell Global Solutions Canada Inc*, 2019 ABQB 977 at para 96, citing *Bahrami v AGS Flexitallic Inc*, 2015 ABQB 536. However, the court may also consider the plaintiff's job search as evidence of the availability of alternate employment: *Bahrami* at para 36.

[146] Gunnewiek's unchallenged evidence was that from "mid-2014 onwards, Sproule was under considerable financial stress on account of the collapse in oil prices and associated reduction in demand for Sproule's services", and that its financial stress continued in the fall of 2015. There is no evidence that this had improved by February 2016 and Sproule did not declare bonuses for FY2016.

[147] The Court may take judicial notice of general trends in economic activity in this province: **Westwood Community League v Swish One Infill General Partner Inc**, 2020 ABQB 299 at para 116; **Thomas v Thomas**, 2014 ABQB 481 at para 69. In **Rice**, another financial professional in the Calgary oil and gas industry was affected by the economic downturn when she was terminated in February 2017: **Rice** at para 94. I find that, at the time of dismissal, the oil and gas downturn in Calgary likely made it harder for McDonald to find employment. McDonald applied to at least 25 jobs in the two-year period from February 2016 to February 2018 and only had one job offer at a significantly lower salary.

[148] McDonald claims a 24-month notice period. Some authority suggests that 24 months is a “rough upper limit” that is typically reserved for senior or management employees: **Molloy v EPCOR Utilities Inc**, 2015 ABQB 356 at para 282. I prefer to consider all the factors rather than formulaic rules but do consider 24 months as the very upper end of the potential range in this case.

[149] Sproule argues the notice period should be 12-13 months, which is loosely based on one month per year of service. This rule-of-thumb approach has fallen out of use and has been criticized or rejected by courts in Alberta and elsewhere for years: **Lederhouse v Vermilion Energy Inc**, 2015 ABQB 387 at paras 15-17; **Vauxhall** at para 143; **Manthadi v ASCO Manufacturing**, 2020 ONCA 485 at para 63, citing **Minott v O’Shanter Development Co**, 1999 CanLII 3686, 168 DLR (4th) 270 (ONCA).

[150] Determination of the notice period is not formulaic, but resort to precedent may be helpful and is the usual practice of parties and courts: **Hodgins v St John Council for Alberta**, 2008 ABCA 173 at para 7. Here, neither party provided the court any specific precedents to support their position. As part of putting a best foot forward, it is incumbent upon the parties to supply the court with jurisprudence supporting their proposed notice period. However, the failure to do so does not necessarily create a genuine issue requiring trial.

[151] In my view, **Rice** is a good starting point, because it involved a 53-year-old accounting professional in Calgary terminated one year after McDonald, although her position was less senior than McDonald’s position, she was slightly younger, and she only had 8 years, seven months service. Justice Eamon noted that he had been presented with cases where individuals of similar age, years of service and roles as Rice were awarded notice in the range of 9 to 15 months; and other cases which suggested a lower range of 6 ½ to 11 months. Justice Eamon would have assessed her notice period at 15 months. Given McDonald’s seniority, more advanced age, and longer service, **Rice** suggests McDonald’s notice period should be more than 15 months.

[152] In **Cordeau-Chatelain v Total E&P Canada Ltd**, 2021 ABQB 794, Justice Price relied on **Rice** and determined an 18-month notice period for a similar-aged management employee with a more unique role with the same years of service.

[153] In **Stanley v Advertising Directory Solutions Inc**, 2014 BCSC 376, a 55-year-old certified general accountant with 15 years of service was entitled to a 19-month notice period. The court considered numerous precedents involving similar-aged professionals with similar years of service. One of those cases involved a 59-year-old controller with 18 years of service, who was provided 16 months notice: **Crang v Delta Catalytic Constructors Ltd**, 1994 CanLII 2897, [1994]

BCJ No 323 (SC). Some of the other cases considered in *Stanley* are useful checks for the appropriate range in this case:

- (a) *Dunlap v British Columbia Hydro and Power Authority* (1988), 1988 CanLII 3217 (BCCA), 32 BCLR (2d) 334 (61-year-old engineer with 10 years service: 20 months);
- (b) *Ansari v BC Hydro & Power Auth*, 1986 CanLII 1023, 2 BCLR (2d) 33 (SC) (50-year-old engineer with 19 years of service: 20 months excluding special factors);
- (c) *Perry v Gulf Minerals Canada Ltd*, [1985] OJ No 1041 (HCJ), 1985 CarswellOnt 3816 (56-year-old VP exploration with 12 years of service: 22 months³);
- (d) *Lyle v Aluminex Extrusions Ltd*, 1996 CanLII 2022 (BCSC), [1996] BCJ No 203 (SC)(QL) (62-year-old general manager with 15 years of service: 20 months);
- (e) *Tull v Norske Skog Canada*, 2004 BCSC 1098 (51-year-old mill manager with 13.5 years of service: 20 months);
- (f) *Brown v Black Clawson-Kennedy Ltd*, [1989] OJ No 2281 (Dist Ct), 1989 CarswellOnt 773 (54-year-old vice president with 17 years of service: 18 months);
- (g) *Brown v OK Builders Supplies Ltd*, [1985] BCJ No 397 (SC), 1985 CarswellBC 777 (53-year-old senior employee with 10 years of service: 12 months);
- (h) *Olesiejuk v Sutherland Hills Rest Home Ltd*, 2001 BCSC 1029 (63-year-old director of care with nursing background with 11 years of service: 12 months);
- (i) *Bening v Ebco Industries Ltd*, [1987] BCJ No 207 (SC), 1987 CarswellBC 1613 (63-year-old director of care with 11 years of service: 15 months); and
- (j) *Konop v Brazilian Canadian Coffee Co*, [2004] OJ No 2784 (HCJ), 2004 CarswellOnt 2696 (59-year-old vice president with 14 years of service: 16 months).

[154] I have also considered these other cases:

- (a) in *McKinley*, a 48-year-old chartered accountant with 17 years of service was entitled to a 22-month notice period;
- (b) in *Hrynkiw v Central City Brewers & Distillers Ltd*, 2020 BCSC 1640, the court assessed a reasonable notice period for a similarly aged financial professional to McDonald, but with only 6 years of service, and found a 12-month notice period. One of the cases the court considered, *Kolaczynski v Benz Sewing Machines Ltd*, [2002] OJ No 1117, 2002 CarswellOnt 1178, involved a 59-year-old controller and

³ This is the notice period referenced for this case in *Stanley*. The court in *Perry* noted other cases ranging from 15 months to 24 months.

officer manager with 9.5 years of service who was entitled to a 15-month notice period; and

- (c) in *Wankling v Saskatchewan Urban Municipalities Association et al.*, 1989 CanLII 4625, 75 Sask R 252 (QB) the court held an 18-month notice period was appropriate for a 61-year-old executive director with 11.5 years of experience and accounting experience. In that case, the court also cited several other cases involving Saskatchewan “senior executives past middle age” which illustrated a notice period range of 12-18 months.

[155] In considering the relevant factors in this case, and these precedents, I conclude that McDonald was entitled to an 18-month notice period.

2. Is it Possible and Appropriate to Fairly Resolve Sproule’s Mitigation Defence Summarily?

[156] McDonald did not find employment during his claimed two-year notice period. In the Defence, Sproule alleges that, because McDonald had advised Sproule that he could obtain a new job anytime, that Sproule “puts McDonald to the proof of his efforts to mitigate.” Even if it is accepted for the sake of argument that McDonald made statements like this, it does not reverse the onus in the context of a mitigation defence.

[157] The employer bears a two-part onus of demonstrating that (1) an employee has failed to make reasonable efforts to find employment; and (2) comparatively similar employment could have been found: *Evans v Teamsters Local Union No 31*, 2008 SCC 20 at para 30; *Red Deer College v Michaels*, 1975 CanLII 15 (SCC), [1976] 2 SCR 324; *Magnan v Brandt Tractor Ltd*, 2008 ABCA 345 at para 30; *Christianson v North Hill News*, 1993 ABCA 232 at para 11; *Cochrane v Western Energy Services Corp*, 2021 ABQB 808 at para 19; *Schaufert v Calgary Co-Operative Association Limited*, 2021 ABQB 579 at paras 129-130.

[158] The plaintiff’s efforts to find employment “will not be nicely weighed, particularly with hindsight” – all the plaintiff need do is to take objectively reasonable steps or make reasonable decisions, not the best possible steps or decisions: *Christianson* at para 11; *Wisser v CEM International Management Consultants Ltd*, 2022 ABQB 414 at para 43. A plaintiff does not have to take risky or unsavoury steps and any gap in the evidence accrues to the plaintiff’s benefit: *Christianson* at para 11.

[159] Sproule did not adduce any evidence on the second element of the two-part test, namely that McDonald could have found comparatively similar employment. In oral argument, Sproule suggested that the court could take judicial notice that employment as a controller is “almost always available.” Judicial notice may be taken of facts that are either (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R v Love*, 2022 ABCA 269 at para 43, citing *R v Find*, 2001 SCC 32 at para 48.

[160] Sproule did not address either branch of the judicial notice test. With respect to the first branch, a cursory review of wrongful dismissal jurisprudence involving termination of controllers, or people in similar accounting roles, readily establishes that controllers do not “almost always”

have employment opportunities available but rather, like any other type of employment, job availability depends on a number of factors including, in Alberta, economic downturns in the oil and gas economy: see, for example: **Fulmer v Nordstrong Equipment Limited**, 2017 ONSC 5529 at para 32; **Crang; Rice** at paras 94, 99. I decline to take judicial notice as suggested by Sproule.

[161] In the questioning on his affidavit, McDonald disclosed that he had received a job offer as a director of finance for a not-for-profit but did not accept it because it was lower than his salary expectations. His preference was to replace his Sproule salary of \$248,848 per year, but would have taken somewhat less for a not-for-profit, and his evidence was he needed at least \$150,000 per year to live on. The offer was significantly lower than his expectations and, therefore, significantly lower than his Sproule salary. A plaintiff is not obligated to accept a significantly lower salary or rate of pay: **Wisser** at para 44; **Forshaw v Aluminex Extrusions Ltd**, 1989 CanLII 234, 39 BCLR (2d) 140 (BCCA) at 6-7; **Horvath v Nanaimo Credit Union**, 1998 CanLII 3917, 39 CCEL (2d) 148 (BCSC) at para 27; **Sunderarajah v Metropolitan Toronto Condominium Corp No 748**, 2005 CanLII 5358, 46 CCEL (3d) 309 (Ont SCJ), leave to appeal refused, [2005] OJ No 2509 at paras 21-22. In any event, McDonald provided further information about his offer in his undertaking responses, and Sproule did not question McDonald further on the details of the offer.

[162] In his undertaking answers, McDonald produced copies of his *curriculum vitae* and documentation related to the 25 job applications he made during the period February 2016 to February 2018. Sproule did not question on McDonald's undertakings.

[163] I am aware of the requirement to consider credibility in the context of a wrongful dismissal mitigation defence: **Christianson** at para 12. As I have noted earlier McDonald's credibility is an issue in this case. However, even where credibility issues exist in relation to other issues, but there are no real credibility issues relevant to reasonable notice or mitigation, summary disposition can still be appropriate: **Beatty v Best Theratronics Ltd**, 2015 ONCA 247 at para 15. In my view, determining whether McDonald's mitigation efforts were reasonable does not require findings about McDonald's credibility because Sproule did not establish a genuine issue for trial in relation to the second branch of its mitigation defence test which it had the onus to prove. Therefore, McDonald's credibility on mitigation does not need to be addressed to allow summary determination. Further, McDonald produced documentation of his mitigation efforts and Sproule chose not to question on them.

[164] Based on the foregoing, I find that Sproule did not raise any, and there are no, genuine issues requiring a trial respecting Sproule's mitigation defence and it is fair and appropriate to resolve it summarily. In the circumstances, the evidentiary gaps accrue to McDonald's benefit, Sproule has not discharged its onus to prove McDonald failed to reasonably mitigate, and McDonald reasonably mitigated his damages.

3. Is it Possible and Appropriate to Fairly Calculate McDonald's Damages Summarily?

[165] Although, as noted, Sproule argued another hearing was required on the question of damages, Sproule nonetheless made submissions on the calculation of damages and neither party pointed to any specific genuine issues requiring a trial in the calculation of McDonald's damages.

I find there are no genuine issues requiring a trial and that it is fair and appropriate to assess McDonald's damages summarily.

[166] The purpose of awarding damages in lieu of reasonable notice is to put the employee in the position they would have been in had they continued to work through to the end of the notice period: **Matthews** at para 59. The employee is entitled to damages based on all the elements of compensation they would have earned had they worked the period of notice: **Wallace** at para 66; **Hunsley v Canadian Energy Services LP**, 2020 ABQB 724 at para 34; **Belanger v Western Ventilation Products Ltd**, 2019 ABQB 571 at para 18.

a. Salary, Vacation Pay and Earned Days

[167] McDonald's \$244,848 annual salary at the time of the Termination is not disputed. This equates to \$20,404 per month and McDonald is entitled to damages of \$367,272.

[168] McDonald claims loss of vacation pay and earned time off, which for a 24-month notice period he calculated to be \$70,629.22. McDonald was entitled to 30 vacation days per year and could earn additional days off if he worked overtime. In questioning, he acknowledged Sproule rarely paid out vacation pay and that he would have taken his vacation rather than being paid for it had he been given proper notice. The Sproule compensation policy, and McDonald's evidence, also supports that he would not have been entitled to be paid out for his earned days off, and that he would have used those days in any event.

[169] In these circumstances, no additional damages are appropriate because they would constitute double-recovery: **Watson v Schlumberger Canada Limited**, 2022 ABKB 646 at paras 145-46, citing **Eberle** at paras 18-24; **Oostlander v Cervus Equipment Corporation**, 2022 ABQB 200 at paras 39-40; **Bagby v Gustavson Drilling Co Ltd**, 1980 ABCA 227 (CanLII), [1980] CarswellAlta 373 at para 32.

b. Bonuses

[170] McDonald claims a loss of bonuses during his notice period. McDonald had a history of receiving them. McDonald claims \$450,686.71 for lost bonuses during the notice period, which he arbitrarily calculated based on his FY2013 and FY2014 bonuses (but not his FY2015 bonus).

[171] McDonald is entitled to bonuses "he would have received" had Sproule not breached the implied term to provide him notice: **Matthews** at para 53. The test of whether a bonus is integral to the employee's compensation assists in answering the question of what the employee would have been paid during the reasonable notice period: **Matthews** at para 58. Bonuses that are integral to the employee's compensation are generally recoverable, and this can include discretionary bonuses: **Matthews** at paras 58-61; **Paquette v TeraGo Networks Inc**, 2016 ONCA 618 at para 17; **Schaufert** at para 89; **Mack** at para 118; **Geddes v Silvestri Holdings Inc**, 2014 ABQB 416 at para 83-84. The court must ask two questions: (1) would the employee have been entitled to the bonus as part of their compensation during the reasonable notice period? If so (2) do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right? (**Matthews** at para 55). The second part of this test is not engaged here.

[172] Sproule’s policy manual confirms the discretionary nature of its bonuses. It also provides that, to receive a bonus, the employee “must be employed by Sproule for the part of the fiscal year under consideration to the day bonus payments are issued.” Van de Veen deposed that, due to cash constraints, Sproule did not declare any bonuses for FY2016, and declared very minimal bonuses in FY2017. The average FY2017 senior executive bonus was \$10,000. McDonald chose not to question Van de Veen on this evidence, and it is therefore the undisputed and unchallenged evidence before the court.

[173] Accordingly, I find that McDonald would not likely have received a FY2016 bonus.

[174] With respect to the FY2017 bonus, I find he would have been allocated a bonus of approximately \$10,000. McDonald did not question Van de Veen on his affidavit to establish that McDonald would likely have continued to be employed by Sproule on the day the FY2017 bonus payments were made (as required under the Sproule policy). McDonald’s evidence is that the bonuses were historically determined after the completion of its audit which was in the fall following the June 30 year end. This means, the FY2017 bonus would have been declared and paid, at the earliest, sometime in fall 2017. Based on the 18-month notice period commencing February 2016, McDonald would have continued to be employed only until August 2017. I find it is likely that McDonald would not have been employed by Sproule when the FY2017 bonus was paid, and he would not have received the bonus.

[175] McDonald has not proven a claim to damages for lost bonuses.

c. Benefits

[176] Benefits which are part of an employee’s compensation package must be considered in assessing wrongful dismissal damages: **Bagby** at para 29; **Hunsley** at para 38. An employee is entitled to benefits they “would have received” had the employer not breached the implied term to provide notice: **Matthews** at para 53. The court must ask two questions: (1) would the employee have been entitled to the benefits as part of their compensation during the reasonable notice period? If so (2) do the terms of the employment contract unambiguously take away or limit that common law right? (**Matthews** at para 55). The second part of this test is not engaged here.

[177] In Alberta, the value of premiums the employer would have paid on insurance plans during the notice period can be compensable damages regardless of whether the employee incurs the cost of replacement coverage: **Rahmath v Louisiana Land & Exploration**, 1989 ABCA 100, 97 AR 246 at para 5; **Williams v Telecommunications Workers Union**, 2011 ABQB 314 at paras 99-104; **Engelhardt** at para 41; **Bagby** at paras 28-30; **Hansen v Altus Energy Services Partnership**, 2010 ABQB 820 at para 61; **Hunsley** at paras 48-50. In some cases, courts will award the amount of the out-of-pocket expenses incurred for amounts that would have been covered by the employer-paid insurance: **Watson** at para 120; **Hansen** at para 61; **Kosteckyj v Paramount Resources Ltd**, 2021 ABQB 225 at paras 60-62. Other factors may come into play where the employee obtains replacement coverage, but those issues are not relevant in this case: see, for example: **Hunsley** at paras 48-49.

[178] Other personal benefits that would have been paid during the notice period, potentially prorated to only reflect personal benefits (and to remove amounts paid to enable the employee to

perform their duties) are generally recoverable: **Hunsley** at para 37. The reasonable expenses of maintaining professional standing are a benefit to the employer but are also a personal benefit and interest to an employee: **Hunsley** at para 85, citing **Orland v Essroc Canada Inc**, 1995 CarswellOnt 592, [1995] OJ NO 4056 (Gen Div) at para 33; **Watson** at para 124.

[179] Where benefits have not been proven with sufficient detail, courts sometimes apply an estimate of 10% of salary if it is reasonable: **Alberta Computers.com Inc v Thibert**, 2019 ABQB 964 at para 145, affirmed 2021 ABCA 213.

[180] In this case, Sproule terminated McDonald's coverage under Sproule's benefits program effective February 2016. Sproule did not specifically challenge McDonald's claimed benefits amounts. Based on my review of the evidence, my findings of McDonald's entitlement to damages for lost benefits are:

- (a) life insurance premiums of \$93.44 per month, for a total of \$1,681.92;
- (b) accidental death and disability insurance of \$10.15 per month, for a total of \$182.70. There were no potential claim events under these plans during the notice period, so the potential complications arising out of the fact that McDonald did not replace this insurance coverage during the notice period do not arise;
- (c) employment insurance refund return amounts of \$9.68 per month, for a total of \$174.27;
- (d) best doctor's benefit of \$19.95 per month, for a total of \$359.10;
- (e) with respect to health and dental plan benefits, McDonald has not proven the value of the premiums that Sproule would have paid during the notice period. However, he did provide evidence of out-of-pocket expenses he incurred during the notice period which would have been paid by insurance or through his Sproule health spending account. I find he is entitled to \$3,399.08 for such expense during the 18-month notice period;
- (f) with respect to CPA Alberta (\$671 per year before GST) and CPA Canada (\$380 per year before GST) annual membership dues, these amounts, appear to have been payable by end of May each year, which means that Sproule would have paid these amounts plus GST twice during the notice period, for a total of \$2,207.10. I find that these are recoverable personal benefits. These amounts cover 24 months (or \$91.96 per month), but only a prorated amount for the partial year is appropriate: **Young v British Columbia (Hydro and Power Authority)**, 2002 BCSC 510 at paras 76-78. McDonald is entitled to \$91.96 for 16 months (May 2016 to August 2018), or \$1,471.36;
- (g) with respect to payment for CPA Alberta mandatory professional development education costs in the amount of \$1,848 per year, I find these are recoverable personal benefits paid by Sproule. The parties did not adduce evidence as to when exactly Sproule paid these amounts each year, and so this amount is prorated to \$154 per month, for a total of \$2,772;

- (h) Financial Executive International Membership dues of \$892.50 per year, I find these are recoverable personal benefits paid by Sproule. The parties did not adduce evidence as to when Sproule paid these amounts each year, and so this amount is prorated to \$74.38 per month, for a total of \$1,338.75; and
- (i) health club membership costs of \$36.75 per month, for at total of \$661.50.

d. Mitigation Costs/Expenses

[181] An employee terminated without notice is entitled to mitigation expenses provided that the expenses flow from mitigation necessitated from the lack of notice, not from the termination itself, as the employer has the right to terminate on notice; however, courts are loathe to second-guess decisions made because of the urgency of being terminated without notice: *Christianson* at para 21; *Smith v Mistras Canada, Inc.*, 2015 ABQB 673 at para 81.

[182] McDonald claims \$2,943.07 in mitigation expenses for his transit costs, a portion of his home internet costs, printing costs, meals, paper, and the costs of a new suit. In my view, McDonald has not established on a balance of probabilities that Sproule caused these costs by failing to provide him reasonable notice. McDonald used transit to travel to work, and the rest of the costs would likely have been incurred in his job search even if he had been given reasonable notice. There is insufficient evidence to find that any of McDonald's mitigation costs were due to the urgency of not being given notice.

e. Summary of Damages for Failure to Provide Reasonable Notice

[183] McDonald's damages for failure to provide reasonable notice are summarized below:

Item	Amount (\$)
Salary	367,272.00
Life Insurance	1,681.92
AD&D Insurance	182.70
Employment Insurance	174.27
Best Doctor's Benefit	359.10
Health and Dental Expenses Paid	3,399.08
Professional Fees	1,471.36
Continuing Education Costs	2,772.00
FEIM Membership	1,338.75
Health Club Membership	661.50
Total	379,312.68

4. Is it Possible and Appropriate to Fairly Resolve McDonald's Bad Faith Damages Claim Summarily?

[184] McDonald seeks additional damages beyond the damages ordinarily arising out of a breach of the duty to provide reasonable notice.

[185] In *Wallace*, the Supreme Court of Canada held that, generally, any award of damages beyond compensation for failure to give reasonable notice, for example for mental distress, had to be founded upon an independent actionable wrong: *Wallace* at para 73. The Court also refused to recognize a separate ability to sue in contract or tort for “bad faith discharge”: *Wallace* at para 88. However, the Court held that employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, and that bad faith conduct in the manner of dismissal was another factor properly compensated for by an addition to the notice period (and therefore damages): *Wallace* at paras 88, 95. The Court said that in the course of dismissal employers ought to be candid, reasonable, honest and forthright and should not engage in conduct that is “unfair or in bad faith by being, for example, untruthful, misleading or unduly insensitive”: *Wallace* at para 98.

[186] McDonald's Statement of Claim pleads additional damages calculated based on an additional 3-month notice period, based on *Wallace*.

[187] In *Keays*, the Supreme Court of Canada revisited claims for additional damages in the manner of termination. It eliminated the distinction between “true aggravated damages” and moral damages resulting from conduct in the manner of termination and said, at para 59:

Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. **Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages.** [Emphasis added]

[188] *Keays* tightened the circumstances in which employees may be awarded additional damages for the manner of dismissal: *Gerling v Camrose Regional Exhibition & Agricultural Society*, 2022 ABCA 210 at para 47.

[189] In *Matthews*, the Supreme Court of Canada again addressed claims for additional damages due to bad faith in the wrongful dismissal context. The Court reconfirmed that a breach of contractual good faith claim rests on a wholly distinct contractual basis from that relating to the failure to provide reasonable notice: *Matthews* at para 83. It also recognized that the duty of honest performance (from *Bhasin v Hrynew*, 2014 SCC 71), which means that parties must not lie to or otherwise knowingly mislead their counterparty about matters directly linked to the performance of the contract, applies to employment contracts: *Matthews* at para 40, citing *Bhasin* at para 33 and *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para 99. Further,

the Court reconfirmed that plaintiffs may assert a breach of the duty to exercise good faith in the manner of dismissal, as previously recognized and clarified in **Wallace** and **Keays**, to support a claim for psychological damages, and that courts are entitled to examine a period of conduct that is not confined to the exact moment of the termination itself: **Matthews** at paras 40 and 81.

[190] **Keays**, **Matthews**, **Bhasin**, and jurisprudence from our Court of Appeal, all confirm that the plaintiff must prove that the manner of dismissal or employer dishonesty caused the employee additional damages based on the principles of **Hadley v Baxendale**: **Keays** at para 59; **Matthews** at paras 44, 88; **Bhasin** at para 54; **Gerling** at para 46. Additional damages must be grounded in “proof of actual damages resulting from the unfair or bad faith conduct” because they are not an automatic enhancement to wrongful dismissal damages: **Elgert v Home Hardware Stores Limited**, 2011 ABCA 112 at paras 74-75; **Merrill Lynch Canada Inc v Soost**, 2010 ABCA 251 at paras 16-18. They are not awarded for unproven allegations in pleadings (**Gerling** at para 50) or for the normal distress and hurt feelings resulting from dismissal (**Keays** at para 56). Where there is no evidence that the employee suffered mental distress as a result of the employer’s misconduct, claims for additional damages will not be successful even if manner of dismissal is disproportionately severe: **Gerling** at para 46; **Lavallee** at paras 141-142.

[191] McDonald’s Statement of Claim does not plead any additional damages caused by the manner of dismissal, which is fatal to his claim for additional damages. However, even if it is assumed he properly pleaded a claim for additional damages, he has not adduced any evidence that he suffered additional damages caused by the manner of dismissal. His evidence of his shock and disappointment having to deal with his termination instead of enjoying the family day long weekend is nothing more than the type of damage that any terminated employee suffers. He provided no medical evidence, any evidence that the manner of dismissal made it more difficult to find employment, or any other evidence warranting additional damages. He has not proven a right to additional damages on the balance of probabilities.

[192] In light of my findings, I need not consider or comment upon Sproule’s conduct in the manner of dismissal.

[193] I am aware that **Matthews** has re-cast claims for additional damages as distinct breach of contract claims and not part of the damage calculation for the breach of the duty to provide reasonable notice as had been the case in **Wallace**. I have decided to address McDonald’s claim for additional damages based on how he pleaded them – as **Wallace** damages – and not a separate distinct breach of the employment contract.

[194] However, even if I were to consider his claim as a separate distinct breach of the employment contract, I would have found that McDonald failed to meet his threshold burden to establish his claim, based on the fact that McDonald has not proven any actual additional damages. In that event, in the context of his Application and the summary judgment granted on his main claim, I would have dismissed McDonald’s application for summary judgment of this claim and would have summarily dismissed this distinct claim even though there was no cross-application for summary dismissal (based on the principles in **Pyrha Design** at paras 18-28), rather than directing a trial of that claim alone. Both parties agreed in oral argument that if I found that McDonald’s additional damages claim was not proven, it was not one that should be directed to

trial. Further, there is no genuine issue for trial given the lack of proof of additional damages caused by the manner of dismissal.

5. Conclusion re Damages

[195] Based on the foregoing, McDonald is granted judgment for wrongful dismissal in the amount of \$379,312.68, plus pre-judgment interest calculated at the prescribed rates under the *Judgment Interest Act* from February 11, 2016, to the date of this decision, plus post-judgment interest to the date of payment.

VI. Conclusion

[196] McDonald's Application for summary judgment is granted. McDonald is declared to have been wrongfully dismissed without cause on February 11, 2016, and is granted judgment as noted above.

[197] In the event the parties are unable to reach agreement on costs arising out of this decision, the following process shall apply:

- (a) within 30 days of this decision, McDonald shall file and serve on Sproule and submit to my office a written cost submission setting out his costs position;
- (b) within 45 days of this decision, Sproule shall file and serve on McDonald and submit to my office a written costs submission setting out its costs position;
- (c) each party's costs submission will be a maximum of 3 pages (excepting attachments, including authorities, draft proposed bill of costs, or reasonable and proper costs summary), single spaced in letter format, and shall provide:
 - (i) their position with respect to the factors set out in rule 10.33;
 - (ii) any formal offer under the Rules or other offer they wish considered;
 - (iii) a draft proposed bill of costs pursuant to Schedule C; and
 - (iv) a summary of their actual reasonable and proper costs that the party incurred in respect of the application and the action.

[198] If no submissions are received pursuant to this direction, there shall be no order as to costs.

Heard on the 16th day of March, 2023.

Dated at the City of Calgary, Alberta this 17th day of October, 2023.

M.A. Marion
J.C.K.B.A.

Appearances:

C.M. Smith
for the Plaintiff

G. Stapon, K.C.
for the Defendant

TAB 10

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *International Longshore & Warehouse
Union Local 502 v. Ford*,
2014 BCSC 65

Date: 20140116
Docket: S126733
Registry: Vancouver

Between:

**International Longshore & Warehouse Union Local 502 and
New Westminster Longshoremen's Holding Society**

Plaintiffs

And

**Robert Victor Eric Ford,
Teresa Dee Ford also known as Teresa Dee Prentice,
Connor Ford, Mitchell Ford, James Ford, Jane Doe #1 and Jane Doe #2**
Defendants

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiffs:

H. Mickelson, Q.C.
A. Dosanjh

Teresa Dee Ford appearing on own behalf
and on behalf of: Mitchell Ford, James Ford
and Connor Ford:

T. D. Ford

Counsel for Defendant,
Robert Victor Eric Ford:

S. Pedlow

Place and Dates of Hearing:

Vancouver, B.C.
June 25 - 27, August 13 - 16, 2013

Place and Date of Judgment:

Vancouver, B.C.
January 16, 2014

INTRODUCTION

[1] The plaintiff, International Longshore & Warehouse Union Local 502 (“Union Local”), is the bargaining agent for longshore workers in the lower mainland of British Columbia, south of the Fraser River. The plaintiff, New Westminster Longshoreman’s Holding Society (“Holding Society”), acquires and holds real estate for the benefit of the Union Local. The defendant Robert Ford (“Mr. Ford”) is the former secretary-treasurer of the Union Local and held that office from October 2003 until August 2012. The defendant Teressa Dee Ford (“Mrs. Ford”) is the wife of Mr. Ford. The defendants Connor Ford, Mitchell Ford, and James Ford are the adult children of Mr. and Mrs. Ford (the “Ford children”).

[2] The plaintiffs apply pursuant to R. 9-7 for the summary trial of their claim for damages.

[3] On September 26, 2012, the plaintiffs filed a notice of civil claim alleging that since at least 2006 Mr. Ford misappropriated money belonging to the plaintiffs and converted it to his own use. The plaintiffs plead that the details of the means to effect the misappropriation and the precise amount of the misappropriation and conversion were then unknown to them but exceeded \$730,000.00. The plaintiffs also allege that Mrs. Ford knew of the misappropriation, actively assisted Mr. Ford to conceal it from the plaintiffs, and took the benefit of the misappropriation. The plaintiffs further allege that each of the Ford children benefitted from the conversion of funds by their father and that they are therefore liable to the plaintiffs for \$2,000 each.

[4] On the application of the plaintiffs, on the same day that the notice of civil claim was filed, this Court ordered that Mr. Ford’s assets in or out of British Columbia be frozen up to a value of \$1,300,000. The order further provided that Mr. Ford could spend up to \$5,000 each month on living expenses and a total of \$10,000 on legal services.

[5] On November 28, 2012, consent orders were made which froze assets of the Ford children and of Mrs. Ford in British Columbia. Mrs. Ford was required to leave up to \$1,300,000 in assets in British Columbia. She was entitled to spend up to

\$6,500 each month on ordinary living expenses and a total of \$25,000 for legal services.

[6] On December 21, 2012, the plaintiffs filed an amended notice of civil claim. It alleges that at least \$1,686,895.73 of the misappropriated money was deposited to joint accounts held by Mr. and Mrs. Ford, that \$2,000 of the misappropriated money was deposited to an account of Mitchell Ford, and that a further \$2,000 was deposited to an account of James Ford.

[7] The plaintiffs allege in their amended notice of civil claim that the total sum of money misappropriated is in excess of \$1,770,000.00. The amended notice of civil claim seeks judgment for the amount of the misappropriated money, tracing orders, and a declaration that certain real and personal property is held by the defendants on a constructive trust for the benefit of the plaintiffs. I understand the plaintiffs seek only a money judgment on this application for a summary trial.

[8] Various notices of application have been filed by the parties including applications by the defendants to vary the freezing orders. Mrs. Ford has informed me that she intends to seek leave to take third party proceedings against certain officials of the Union Local.

[9] After hearing the submissions of the parties I advised them that I would hear and rule only on the plaintiffs' application for a summary trial of their claim for a money judgment. Other applications will be heard if necessary at a later date.

[10] My initial view of the plaintiffs' application was that the action was not suitable for a summary trial. I was presented with 10 volumes of the application record, which includes 36 affidavits, many with multiple exhibits. In addition further filings were made during the hearing. Such extensive written material, a great deal of which the defendants challenge, normally would not lend itself to summary disposition. However, on reflection I have concluded that this is an action to which a summary trial is suited. I will have more to say about its suitability later in these reasons but will observe now that the plaintiffs rely on the expert opinions of Jennifer Blacklock, a

forensic accountant whose opinions are clearly set out and persuasive. Although Ms. Blacklock's opinions have been heavily criticised in argument, no defence opinion was offered. I am persuaded on considering the whole of the application record that the issues are narrow and there is a reliable and objective body of evidence on which the facts can be found.

ANALYSIS

Is Mr. Ford liable for the misappropriation of the Union Local's funds?

[11] There can be no doubt Mr. Ford took a considerable amount of money from the Union Local, well beyond his own salary and expenses as secretary-treasurer. His defence, at least in part, is that he had authority to take it because the Union Local had long-standing practices which he followed and there was no wrongful taking on his part. The evidence does not support that contention. There was no practice that if known to the members of the Union Local could have led them to authorize Mr. Ford to appropriate for his own use sums of money which greatly exceeded his aggregate salary and benefits for the years 2006 through 2012. The only real issue in regard to Mr. Ford's conduct is the amount of the judgment that ought to be given against him, and even that is readily resolved on the evidence.

[12] Mr. Ford's six years of misappropriation of the Union Local's money was not accomplished by a clever and complex plan. He was in part enabled to perpetrate his dishonest scheme because of the lax accounting practices of the Union Local. That cannot excuse his conduct. A person who commits fraud on another person cannot blame the victim by telling him that he should have watched his money more carefully: *United Services Funds v. Richardson Greenshields of Canada Ltd.*, [1988] 48 D.L.R. (4th) 98, B.C.J. No. 123.

[13] In part, Mr. Ford was able to take large sums of money because the Union Local paid its bills mainly by cheque which Mr. Ford could manipulate to his advantage, and it frequently dealt in cash. There was a long-standing practice throughout much of Mr. Ford's time as secretary-treasurer by which he would obtain cheques signed in blank by another signing officer, usually the president of the

Union Local. Mr. Ford took advantage of this practice by writing cheques in essence to himself and camouflaging his deceit in various ways.

[14] Mr. Ford was able to escape detection for several years both because of the Union's unfortunately lax accounting practices, and also because Mr. Ford was a long-serving secretary-treasurer who was widely trusted within a culture where the loyalty of the Union Local members to each other was taken very seriously. Mr. Ford was assumed to be worthy of that trust.

[15] Chad O'Neill was elected president of the Union Local in 2009 for a one-year term and re-elected in the following years including 2012. He knew Mr. Ford for many years before becoming president and recognized Mr. Ford as an "expert" in managing the financial affairs of the Union Local. Mr. O'Neill was frequently away from the Union Local's dispatch office on business and during his extended absences he left cheques signed in blank and drawn on the Union Local's bank account. They were left with Mr. Ford to use as needed.

[16] In August 2012, Mr. O'Neill was told by the Union Local's bank manager that cheques payable to Mr. Ford had been drawn on the Union Local's account for about \$400,000. Mr. O'Neill telephoned Mr. Ford and told him he wanted to speak to him about the Union Local's money. Mr. Ford's response was that he had won money through online gambling but needed some money from the Union Local. Mr. O'Neill did not understand these remarks and agreed to meet with Mr. Ford to talk about what had happened.

[17] At the meeting Mr. Ford told Mr. O'Neill that he "had got messed up with the wrong people" who had forced him "to do things with Local 502's money". On August 17, 2012, Mr. Ford telephoned Mr. O'Neill and left a message saying:

Chad its Robbie going with er 2:30 um Friday. I was just wondering if you a chance that you could give me a call. Um I have got a bunch of phone calls from guys who spoke in an Executive Meeting on Tuesday I guess at 1:00 o'clock or something, I am pretty sure I know what it is about. Um and listen I am just wanted to talk to you and see if there is something er I really don't want to drag the membership through anything, so if there is something that you suggest that I can bring to prevent dragging er this into media and

everything. Its like if it ends up there. I am listening I don't want anyone else hurt or the Local harmed in anyway so if you could give me a call please, let me know if I got to do what I got to do and prevent anything else from anybody. I don't want to see you dragged through anything or to anyone else. None of you guys had anything to do with this so, please give me a call and er I don't know.

On August 20, 2012, Mr. Ford resigned as secretary-treasurer of the Union Local.

[18] On September 12, 2012, Mr. O'Neill and Chris Verbeek, who had replaced Mr. Ford as secretary-treasurer, spoke on the telephone with Mr. Ford. The conversation was recorded by Mr. Verbeek. Mr. Ford made a number of inculpatory remarks, some of which are the following:

I just want to talk to you Chad, I just want to come clean with everything.

....

I want to fix this, I want to make it right Chad.

...

...I haven't had a chance to look at anything. I know that there is money, I figure there is probably a couple \$100,000 Chad. But I don't think it's...I don't believe it is more than that.

...

Chad I want to do everything I can do to pay it back, yes.

...

...Whatever it is that...that owed I do want to be able to look at it and go over it, but whatever is owed at the end of the day, yes my intentions are to do everything in my power to pay it back Chad.

[19] In the only affidavit Mr. Ford has made in these proceedings in which he responds to the evidence given to him by Mr. O'Neill he does not deny the accuracy of the recording of his remarks on September 12, 2012 to Mr. O'Neill and Mr. Verbeek. Mr. Ford states only that he "was not aware that his telephone conversation was being recorded".

[20] Mr. O'Neill deposes that on the afternoon of September 12, 2012, he and a past president of the International Longshore and Warehouse Union of Canada met with Mr. Ford. Mr. Ford informed them that he had taken \$200,000 to \$300,000 from

the Union Local because he had a gambling problem. The gambling problem was not denied on the hearing before me.

[21] The explanations Mr. Ford provides for his conduct, which he says was consistent with the Union Local's practices, are:

A. Cheque Cashing Services

Mr. Ford says he would cash cheques for members and to do so he kept cash on hand at the union office for that purpose. Mr. Ford would write cheques to himself to acquire the cash to provide to the members who wished to cash cheques;

B. Loans to Members

He loaned Union Local money to members ranging from \$500 to \$3,500 and recorded the loans in a "loan book". He acknowledges that he also "partook in the financial service offered by Local 502 by making loans to myself drawn on Local 502's account". He insists he "did not steal from Local 502. It was always my intention to repay the full balance of the loans";

C. Paying for Local 502 Expenses

Mr. Ford deposes to the payment of Union Local expenses from his personal accounts or by use of a personal credit card. He lists 41 examples in 2010, 2011 and 2012, which in the aggregate total is \$27,627.40;

D. Liquor Purchases

Mr. Ford refers to substantial purchases of liquor for Union Local events that were sometimes put on his personal credit card which he repaid with a cheque drawn on the Union Local's bank account.

[22] I do not accept any of the above provides a benign explanation for Mr. Ford's conduct.

The Holding Society

[23] The Holding Society alleges that in 2009 Mr. Ford used its money to pay the tax remittance obligations of the Union Local. The allegation of the Holding Society is that when the Canada Revenue Agency (the “CRA”) made a demand on the Union Local for payment of the tax remittances Mr. Ford used in excess of \$400,000 belonging to the Holding Society to pay the tax debt of the Union Local. Mr. Ford acknowledges he was neither authorized to make such payment, nor did he disclose the payment to the Union Local’s executive. He asserts he was not responsible for making the remittances and that it is the fault of Mr. O’Donnell, the Union Local’s business agent, and that remittances were made from the Holding Society’s account, not the Union Local’s. I do not accept his submission. Mr. Ford was responsible for making payments from the proper account; he failed to do so and lied to the Union Local’s executive about that failure. I comment on this deceit in paragraph 37 of these reasons.

The Ford family’s finances

[24] On Mr. Ford’s examination for discovery he testified that he had no need to take extra money from the Union Local to pay his own bills because together he and Mrs. Ford earned a sufficient income to meet their needs. However, the Fords’ bank accounts were frequently heavily overdrawn and they repeatedly borrowed against their home to spend beyond their means. From November 2007 until March 2009, Mr. and Mrs. Ford had bank overdrafts that reached almost \$100,000. They remortgaged their home to eliminate the overdraft but it soon mounted again. It is apparent Mr. Ford augmented his income by taking money from the Union Local because he needed to do so to meet obligations he had incurred at least partially by gambling losses.

Some examples of methods of misappropriation

[25] On occasion Mr. Ford wrote “strike fund” on cheque stubs. He acknowledged on discovery that there was no strike in the relevant period. The false entries on

cheque stubs were intended to hide the fact that the cheques had actually been made payable to Mr. Ford without authority to do so.

[26] Mr. Ford agreed on his examination for discovery that he had taken large sums of money from the Union Local to pay down his credit card on which he had incurred gambling debts. He, of course, had no authority to pay his debts with the Union Local's money.

[27] In April 2011 Mr. Ford wrote cheques to himself on the Union Local's account totalling upwards of \$100,000. He characterizes the money as a loan but accepts he had no authority to loan himself money belonging to the Union Local. Relatively small loans up to a few thousand dollars were made to some members, apparently to the knowledge of the executive, but never in the large sums taken by Mr. Ford for himself.

[28] Mr. Ford testified on discovery that he had repaid the "loans". No documentary evidence was provided that he did so. He testified that he borrowed from family members to repay the loans to the Union Local but no evidence was offered to that effect from any member of his family.

[29] On his examination for discovery Mr. Ford said the following about the "loan" that he took in April 2011:

Q. Who told you at the union that you were free to take \$100,000 just in the month of April 2011, Mr. Ford, and use it to pay your gambling debts on your Vancity Visa? Who told you that?

A. Nobody

Q. But you did it, didn't you?

A. No.

Q. You deny taking, even in the month of April, close to \$100,000 from the union and using that money to pay towards your Vancity Visa?

A. I'm not saying that I'm denying it. What I'm saying is that's -- that isn't -- there wasn't over \$100,000 missing out of the account for that month.

Q. I'm not talking about missing out of the account. I'm talking about you took \$100,000 more than you were entitled to by way of salary and you deposited it into your own account, and you used that money to

pay off your gambling debts on your Vancity Visa. I don't care if at the end of the piece it's \$90,000 or \$100,000 for that month. Nobody authorized you to take money of that magnitude and use it to pay your personal gambling debts, did they?

A. No.

[30] On February 19, 2012, Mr. Ford wrote a cheque to himself from the Union Local's account for \$10,750 and noted on the cheque that it was for holiday pay. To deceive his employer on the cheque stub he wrote "cash to hall".

The Blacklock Report

[31] The Blacklock report is dated November 25, 2012 ("the Blacklock report"). Ms. Blacklock describes the scope of her review on page 3 of the report as follows:

Scope

4. My review consisted of a review of the bank statements, cancelled cheques, payroll records, supplier invoices and expense reports for Local 502 for the period from July 2006 through to August 15, 2012 ("the relevant period"). The records for 2006 to 2008 except for the bank statements, cancelled cheques, audited financial statements and some payroll records were unavailable at the time of my review.
5. I reviewed the accounting records for the Holding Society for 2009 to 2012, including the bank statements and the transactions between Local 502 and the Holding Society, as well as the audited financial statements for 2008.

[32] Ms. Blacklock concluded that over the six years from July 2006 to August 2012 more than \$1.77 million was misappropriated from the Union Local by Mr. Ford. Of the money wrongly taken by Mr. Ford, Ms. Blacklock determined \$1,687,095.73 was deposited into two joint bank accounts of Mr. and Mrs. Ford namely:

Vancouver City Savings Credit Union	\$1,415,651.95
Branch 64	
Bank of Nova Scotia ...	<u>\$271,443.78</u>
	<u>\$1,687,095.73</u>

[33] The Blacklock report also shows that \$2,000 was paid by cheque on the Union Local's account to each of Mitchell Ford and James Ford and \$2,150 to

“Teressa Prentice”, who is Mrs. Ford. There was no documentation within the records of the Union Local to support payments to members of Mr. Ford’s family. The payments to Mitchell Ford and James Ford were for scholarships which the Union Local provided to children of its members through a draw. On his examination for discovery Mr. Ford was shown the two cheques for \$2,000 and acknowledged one “was a bad mistake... I shouldn’t have given him a scholarship. He wasn’t drawn”. Mr. Ford says he repaid the \$4,000 the Union Local paid to his sons but no documentary evidence was provided to support this.

[34] Ms. Blacklock took into account authorized payments to Mr. Ford for his net pay, holiday pay, and for expenses of the Union Local which he had met personally. Her calculation of expenses is necessarily an estimate because of the absence of full supporting documents. Ms. Blacklock concludes that over the six year period from 2006 through to August 2012, \$2,481,443.48 was withdrawn from the Union Local’s bank account by Mr. Ford of which \$706,040.26 was authorized, leaving a balance of unauthorized payments in the sum of \$1,775,403.22.

[35] A revised report increases the unauthorized payments to Mr. Ford by \$700 to \$1,776,103.22.

[36] In my view a discount should be applied to Ms. Blacklock’s total of unauthorized payments in a manner that favours Mr. Ford to reflect her estimates of legitimate reimbursement of expenses. I assess the net amount of the unauthorized takings by Mr. Ford at \$1,690,000.

[37] Ms. Blacklock refers to Mr. Ford’s dealings with the Holding Society’s account. I am satisfied Mr. Ford was responsible for withholding taxes which ought to have been remitted to the CRA. \$434,073.06 was paid by Mr. Ford to the CRA out of the Holding Society’s bank account to meet Union Local obligations and in addition there were penalties and interest of \$88,700.37 which he paid from that account. In June 2012 Mr. Ford reported falsely to the Union Local executive that the Holding Society’s bank account had a balance of \$542,658.33 when the balance was actually \$2,446.77. Mr. Ford had virtually exhausted the Holding Society’s

account to pay the Union Local's tax obligations which it could not meet because Mr. Ford had misappropriated its money.

Is Mr. Ford unfairly deprived of the ability to defend a summary trial?

[38] Mr. Ford submits that he has not been able to present his defence adequately because the "loan book" and many other documents have not been disclosed by the Union Local and if they had they would vindicate Mr. Ford. The plaintiffs deny the existence of a "loan book".

[39] I accept the Union Local loaned money from time to time to members who were having financial difficulties. However, the evidence is incontrovertible that Mr. Ford "loaned" himself large sums of money far beyond his salary which ranged from \$85,000 to \$104,000 annually over the relevant period. I cannot find the loan book existed but even if it did, there can be no basis for Mr. Ford to justify making "loans" to himself on the grand scale that he clearly did.

[40] Mr. Ford also submits that he cannot adequately defend himself at a summary trial, or perhaps at any trial, because the plaintiffs have shredded large numbers of documents that may have assisted his defence.

[41] Mr. Ford relies on *Dyk v. Protec Automotive Repairs* (1998), 41 B.C.L.R. (3d) 197, in which Mr. Justice Burnyeat reviewed the authorities in Canada on spoliation and found that for the doctrine of spoliation to have application the destruction of an object must have been intended to suppress the truth. I cannot find that the plaintiffs shredded documents for that purpose.

[42] The plaintiffs often shredded documents over the years, long before concerns arose about Mr. Ford's conduct of his office as secretary-treasurer. Mr. Ford argues that after the investigation into his accounting practices began the plaintiffs hired a mobile shredding firm to shred a large quantity of papers, among which were documents that to the knowledge of the plaintiffs, would have assisted Mr. Ford to demonstrate his innocence.

[43] The evidence is that Mr. O'Neill had "cleaned his office out" and instructed Mr. O'Donnell to "get a shredder truck" because the shredders already in use in the dispatch office did not have the capacity to handle the volume of paper to be shredded. Some of the shredding was done after the investigation began into Mr. Ford's conduct but there is no evidence, apart from Mr. Ford's suspicions, that the plaintiffs destroyed documents that were relevant to the conduct of Mr. Ford. On the contrary, there is no reason to conclude the plaintiffs were motivated by anything other than a desire to clean up the dispatch office. I find the Union Local did not shred documents to prevent the truth about its finances coming to light.

[44] As mentioned, Mr. Ford attempts to blame Mr. O'Donnell for the failure to make proper remittances to the CRA. His position seems to be that Mr. O'Donnell ought to be added as a party before this matter is tried. Mr. O'Donnell was asked to assist Mr. Ford in May 2009 when Mr. Ford became ill. However Mr. Ford continued to exercise control from his home over the Union Local's accounting and even when he was on sick leave he attended the Union Local's office on occasion. Mr. O'Donnell has no expertise in accounting and I accept his evidence that Mr. Ford did not instruct him on how to make remittances to the CRA. Mr. O'Donnell understood that Mr. Ford "was issuing ... cheques to the Receiver General from his house and that's why I signed them when he requested me to sign". The evidence supports Mr. O'Donnell's understanding.

[45] As a further basis to resist a summary trial Mr. Ford submits this action and a negligence action the Union Local has brought against its former auditors ought to be tried together. If there is any substance to that submission, which I doubt, Mr. Ford ought to have applied for an order that the two actions be tried together. I see no reason for the plaintiffs to be deprived a summary trial now of this action because they have another action which may have some relationship to it.

[46] In *Orangeville Raceway Ltd. v. Wood Gundy Inc.*, [1995] 6 B.C.L.R. (3d) 391, B.C.J. No. 1254 (C.A.) an appeal was taken from a finding that the action

was suitable for a summary trial. Goldie J.A. for the court made the following observations on a summary trial under R. 18A, now R. 9-7, at paras. 30 to 32:

30 The locus classicus on the scope and purpose of Rule 18A is the judgment of this Court in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202.

31 In that case the trial judge had held that a summary trial under Rule 18A was to be resorted to only if a conventional trial could not possibly make any difference. This was held to be an error in law. The distinction between an application under Rule 18 and a summary trial under Rule 18A was again emphasized in *Inspiration*: in the former, summary judgment may not be given if there is a bona fide triable issue while in the latter, the court actually tries the issues raised by the pleadings on affidavits.

32 There is substituted for the traditional safeguards associated with a conventional trial other procedural safeguards, notably those contained in Rule 18A(5) which for the sake of convenience I set out again:

Judgment

(5) On the hearing of the application, the court may grant judgment in favour of any party either upon an issue or generally, unless

(a) the court is unable on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(b) the court is of the opinion that it would be unjust to decide the issues on the application,

and may impose terms respecting enforcement of the judgment, including a stay of execution, as it thinks just, and may award costs.

[47] I have found it possible on the whole of the evidence to find the facts necessary to decide the issues raised by the pleadings in relation to Mr. Ford. A conventional trial is unnecessary to determine his liability. Chief Justice McEachern in *Inspiration Management* quoted at para. 40 from *Orangeville Raceway Ltd.*:

In my judgment, it must be accepted that while every effort must be made to ensure a just result, the volumes of litigation presently before our courts, the urgency of some cases, and the cost of litigation do not always permit the luxury of a full trial with all traditional safeguards in every case, particularly if a just result can be achieved by a less expensive and more expeditious procedure. ...

[48] A just result can be achieved on the claim against Mr. Ford without the expense and substantial delay involved in a conventional trial.

The liability of Mrs. Ford

[49] Mrs. Ford's evidence on her examination for discovery was that she never looked at the joint bank statements or credit card statements that were delivered to her home. The plaintiffs submit that those facts, together with the obvious fact that the misappropriated money did not belong to Mrs. Ford, are sufficient to create liability on Mrs. Ford for the return of money had and received by mistake. They submit the fact that Mrs. Ford was "innocent" in the sense that she disavows knowledge of her husband's deceit is irrelevant to her liability. I understand the plaintiffs do not rely on the allegation in the amended notice of civil claim that Mrs. Ford participated in Mr. Ford's deceit.

[50] The plaintiffs submit that a plaintiff who has mistakenly given money to a defendant who is unaware that she has received money to which she is not entitled may nevertheless, depending on the circumstances, recover a judgment for the money "had and received". I agree but I have a concern about summarily trying that issue against Mrs. Ford.

[51] In *RBC Dominion Securities v. Dawson* (1992), 111 D.L.R. (4th) 230, the Newfoundland Court of Appeal considered whether defences had been established precluding the appellant from recovering money paid under a mistake of fact. The respondents had each sold shares which the appellant had mistakenly informed them had a value beyond their real price at the relevant time. The shares were sold by the respondents for the inflated price and the appellant sued to recover the excess. The trial judge held the respondents, who had spent the money, had established two defences namely estoppel and "change of circumstances".

[52] The Newfoundland Court of Appeal discussed the governing authorities and concluded at para. 29 "that estoppel is no longer an appropriate method of dealing with the problem [of money paid under a mistake of fact]. The change of circumstances defence is one which most fairly balances the equities". The trial judge analyzed the case on the basis of the estoppel defence and finding such defence arose had no need to then analyze the change of circumstances defence.

Nevertheless, the trial judge in the course of his reasons found that the circumstances of the respondents had been “substantially changed as a result of the receipt of such monies to the extent that it would be inequitable to direct that they repay same to the plaintiff”. The issue on the appeal became “whether the respondents established change of circumstances so as to limit their liability to the appellant” and, if so, to what extent. The court held the burden was on the defendant to establish the defence of change of circumstances. The court then referred to *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1, in which the Supreme Court of Canada held that the change of circumstances defence failed because there was:

...no evidence of any special projects being undertaken or special financial commitments made because of the receipt of these payments, nor that the [defendant] altered its position in any way because these moneys were received. The mere fact that the monies were spent does not, by itself, furnish an answer to the claim for repayment.

[53] I do not have evidence of any “special projects” undertaken by Mrs. Ford or “special financial commitments” made as a result of the Union Local’s misappropriated money reaching her bank account. On the contrary Mrs. Ford’s evidence is that she paid no particular attention to the extra money but instead carried on in her usual way to spend money from her joint accounts with Mr. Ford to meet her family’s expenses. However, Mrs. Ford represents herself. She may not have appreciated the evidence needed to meet the “change of circumstance” test nor even appreciate that test is part of the law of British Columbia. When a party applies for a summary trial it is incumbent on other parties to prepare adequately to respond with both evidence and argument. However, in this matter Mrs. Ford may have evidence to offer which as a self-represented litigant she did not understand was needed. I am not prepared now to give judgment against Mrs. Ford summarily at least without an opportunity for her to consider these reasons. The application against Mrs. Ford will be adjourned to permit her, if she chooses to do so, to offer evidence to meet the “change of circumstance” test. She will have 60 days from the date of these reasons to provide that evidence, after which the plaintiffs will be

entitled to set down a further hearing for a summary trial of Mrs. Ford's liability directed to the change of circumstances issue. I am seized of this matter.

Is Mrs. Ford unfairly deprived of the ability to defend a summary trial for other reasons?

[54] Mrs. Ford submits that she has not been able to obtain relevant documents nor to conduct oral examinations for discovery. I do not accept that this is correct. There has been very extensive disclosure by the plaintiffs of financial records and Mrs. Ford has been provided with written authority to obtain records from the Union Local's bank. Mrs. Ford conducted an examination for discovery of Mr. Verbeek, the secretary-treasurer of the Union Local. She also conducted an examination for discovery of Mr. O'Donnell. I am informed that she delivered an appointment to examine Mr. O'Neill without first consulting with the plaintiff's counsel. Due to scheduling difficulties the plaintiffs requested that Mr. O'Neill's examination for discovery begin at 1:00 p.m. on the day Mrs. Ford had selected. Instead of yielding to this request, Mrs. Ford attended at 10:00 a.m. on the day she had selected and had the appointment endorsed with a certificate of non-attendance. This was a deliberate attempt to create a false perception that the plaintiffs were refusing to cooperate.

[55] In dealing with the merits of the plaintiffs' claim, Mrs. Ford criticizes the Blacklock report. I have heard extensive submissions by Mrs. Ford on her view of the alleged inadequacies of the Blacklock report. I do not accept her criticisms as valid. In my opinion the report is reliable.

[56] Mrs. Ford attempts to blame others for the conduct of Mr. Ford that led to Mrs. Ford receiving money that did not belong to her and argues, for example, relying on her examination for discovery of Mr. Verbeek, that he not Mr. Ford was responsible for false general ledger entries in the Union Local's accounts concerning the excessive "loans". Mr. Verbeek's evidence does not support that argument and I do not accept Mr. Ford's evidence if it contrasts with that of any other witness.

[57] Mrs. Ford attempted to rehabilitate her husband's to avoid her own potential liability. However, Mr. Ford does not expressly deny making deceitful bookkeeping entries. Often while attempting to evade the examiner on discovery he took refuge in ignorance when his dishonest general ledger entries were pointed out to him. For example when asked on discovery about a "signing bonus" that he had paid to himself the following exchange took place:

- Q. Okay. And this is -- this is a cheque that you've written "signing bonus, Rob Ford"?
- A. M'mm-hmm.
- Q. Now, can you find that, first of all, where I would find that on Exhibit V, that cheque?
- A. It's not listed.
- Q. So is that another example where you started doing something else and you turned your computer off and forgot to enter this cheque?
- A. Perhaps. But like I told you last time, at the end of every year when I go through the cheques, any missing cheques would be put into the system.
- Q. Well, it just so happened that these cheques -- so you paid yourself \$11,000 as a signing bonus?
- A. M'mm-hmm.
- Q. Now, you've written "signing bonus" on another cheque stub that you didn't enter into the system, although you entered everybody else's into the system, which you now said shouldn't read "signing bonus," it should read "holiday pay." And now we're on cheque number 16166 that says "signing bonus."
- A. M'mm-hmm.
- Q. Is it just bad luck that these are the cheques that aren't entered? It doesn't look very good, does it?
- A. I can't explain it.
- Q. Can't explain it. Now, how about this: So now you're giving yourself a signing bonus. Is this supposed to be holiday pay?
- A. I can't recall.

[58] Mrs. Ford blames the Union Local for its sloppy accounting practices for her inability to defend a summary trial application. There is substance to the charge of sloppy accounting but Mrs. Ford cannot rely on it as an excuse. Nor is it relevant to the determination of Mrs. Ford's or Mr. Ford's liability to the plaintiffs.

DISPOSITION

[59] There will be judgment for the plaintiffs against Robert Victor Eric Ford for the sum of \$1,690,000, judgment against the defendant Mitchell Ford for the sum of \$2,000 and judgment against the defendant James Ford for the sum of \$2,000. The R. 9(7) application against Mrs. Ford is adjourned on the basis described in these reasons.

[60] The parties may speak to costs.

“The Honourable Mr. Justice Affleck”

TAB 11

Court of Queen's Bench of Alberta

Citation: Wilson v. Bobbie, 2006 ABQB 22

Date: 20060111
Docket: 9603 24116
Registry: Edmonton

Between:

Frank John Wilson

Plaintiff

- and -

Jeffery John Bobbie

Defendant

**Reasons for Judgment
of the
Honourable Mr. Justice Frans F. Slatter**

[1] This is an application by the Defendant to open up a judgment given in default of appearance. The underlying issue is whether provocation can constitute contributory negligence in a tort action for assault, or whether provocation otherwise reduces damages.

Facts

[2] On November 5, 1995, the Defendant assaulted the Plaintiff in the parking lot of a bar. The Plaintiff suffered serious injuries, and was in a coma for approximately 26 days.

[3] On December 5, 1996, the Defendant was convicted of aggravated assault, and was sentenced to three years in prison.

[4] On November 22, 1996, the Plaintiff commenced an action for damages for his injuries. While the tort sued on is said to be assault, it is in fact a battery, the confusion arising because what is an assault in criminal law is in tort a battery: *Hurley v. Moore* (1993), 107 D.L.R. (4th) 664, 112 Nfld. & P.E.I.R. 40 (Nfld. C.A.) at paras. 22-25. The Defendant filed a Statement of Defence on April 14, 1997, denying the assault, or in the alternative, pleading self-defence, or a consensual fight.

[5] Examinations for discovery were held in November of 1998. In July of 1999 the Defendant's counsel ceased to act, giving the address for service of the Defendant as Box 565, Bon Accord.

[6] Counsel for the Plaintiff brought a motion for summary judgment eventually returnable on June 4, 2002. The Notice of Motion was sent to the Defendant at his designated address for service at Box 565, Bon Accord, both by ordinary mail and by certified mail. The Defendant acknowledges receiving a postcard from the post office indicating that there was certified mail to be picked up, admits that he did not make arrangements to pick up the letter because of his work schedule, but denies knowing the contents of the letter. The Defendant alleges that he never received the copies of the documents sent by ordinary mail, although he acknowledges that his mailing address at the time was Box 565, Bon Accord. The Plaintiff deposes that the documents sent by ordinary mail were never returned, and were presumed to be received. On June 4, 2002, summary judgment was granted against the Defendant, in default of his appearance on the return date of the summary judgment application. A trial to determine the quantum of the Plaintiff's damages was directed. The damage assessment is presently scheduled for January 23, 2006.

[7] In August of 2005, the Plaintiff attempted to serve the Defendant with notice of the trial, the Certificate of Readiness, and certain medical reports that will be relied on at the assessment of damages. This material eventually came to the attention of the Defendant, who brought an application to open up the default judgment. The Defendant acknowledges that the assault happened, and that he bears some responsibility for the damages, but he argues that the Plaintiff should be held contributorily negligent because the Plaintiff provoked the assault.

[8] The Defendant deposes that on the night of the assault he was trying to gain entry to his own car in the parking lot of the bar, using a coat hanger, when the Plaintiff attacked him without reason or provocation. The Defendant deposes to his belief that the attack was made on the instructions of Barbara Gillman, a previous girlfriend of the Defendant who had a grievance against him. The Defendant deposes that his assault on the Plaintiff was provoked by the initial assault by the Plaintiff, although he acknowledges that his response to the attack exceeded all reasonable limits. While the Defendant acknowledges that he was held criminally responsible for the assault, he maintains the position that he should be entitled to defend the tort action based on the provocation of the Plaintiff. The Plaintiff has no memory of the assault due to the brain injury he suffered, and so cannot rebut these allegations. At the criminal trial Ms. Gillman apparently denied any involvement.

Opening up Default Judgment

[9] Where a defendant is noted in default, or has a judgment entered against him through default of appearance, the defendant can open up the judgment if certain conditions are met. The defendant must generally show that he has an arguable defence, he has some reasonable excuse for failing to defend or appear, and that he moved promptly once he discovered the default judgment: *Ash Temple v. Tkachyk* (1999), 258 A.R. 355 (M.).

[10] In this case the Defendant appears to have moved promptly once he discovered the default judgment against himself. I am not however satisfied that the Defendant has explained his non-appearance. He was properly served at his address for service, and simply neglected to pick up the certified mail. Every litigant is required to place on the court record an address for service. The other parties are then at liberty to serve court documents at that address under Rule 24. Every litigant has an obligation to ensure that court documents sent to the address for service are retrieved: R. 24(2); *Musial v. Mohawk Oil Co.* (1992), 131 A.R. 183 (C.A.); *Klemka v. SPS Holdings Ltd.*, [1984] A.J. No. 323 (M.). Counsel for the Defendant argued that since the Defendant was a self-represented party, the Plaintiff should have arranged to serve him personally. There is however only one set of Rules, and it applies to both represented and self-represented parties. The Defendant's explanation that he simply failed to make arrangements to pick up his mail is inadequate, and he is not in a position to open up the default judgment. Whether he has demonstrated an arguable defence is discussed *infra*, paras. 14 *ff.*

Assessment of Damages

[11] A defendant who has had a default judgment entered against him cannot thereafter contest the merits of the claim, without first setting aside the default judgment. However, a defendant noted in default is still entitled to contest the quantum of damages to which the plaintiff is entitled: *Sulef v. Parkin* (1966), 57 W.W.R. 236 (Alta. C.A.); *Mrs. R. v. Mr. W.*, 2003 ABQB 50, 22 Alta. L.R. (4th) 178, at para. 49.

[12] Where the plaintiff's claim is liquidated, then in default of defence or appearance the plaintiff will take a default judgment for the liquidated amount. However, where the plaintiff's claim is unliquidated, an assessment must still be held to determine the quantum of damages to which the plaintiff is entitled. Claims for damages for personal injuries, such as those claimed by the Plaintiff, are unliquidated and must be assessed: *HSBC Bank Canada v. 1100336 Alberta Inc. (c.o.b. Incredible Electronics Wholesale)*, 2005 ABQB 658, at para. 10.

[13] It follows that the Defendant, notwithstanding the default judgment, is still entitled to appear at the damage assessment, and contest the quantum of the Plaintiff's claim. The Defendant does not need to set aside the summary judgment to do that, and to the extent that provocation is relevant to the quantum of damages, the Plaintiff can still raise it.

Counterclaim for the Assault

[14] The final part of the test is whether the Defendant has shown a viable defence that would justify opening up the default judgment. It will be apparent that if the Defendant's story is true, he would have had a good action against the Plaintiff and Ms. Gillman for assault. When the Plaintiff sued him for assault, he could have counterclaimed for his own assault. The Plaintiff would have been civilly liable for any damages suffered by the Defendant, and the Defendant would have been civilly liable for the damages suffered by the Plaintiff. It is likely that in the circumstances the two amounts would have been set off.

[15] Thus, the fact that the Plaintiff may have attacked the Defendant first is no direct answer to the tort action. The Defendant could have commenced his own action for his own tortious damages, although the limitation period has now long since passed. The point is that the Defendant is not now entitled to open up the default judgment merely to assert that the Plaintiff assaulted him as well.

Contributory Negligence

[16] The next issue is whether the Plaintiff's assault of the Defendant constitutes contributory negligence. Section 1 of the *Contributory Negligence Act*, R.S.A. 2000, c. C-27 provides that:

- 1(1) Where by the fault of two or more persons, damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.
- (2) Nothing in this section operates to render a person liable for damage or loss to which the person's fault has not contributed.

The Defendant argues that the original assault or provocation of the Plaintiff is "fault" within the meaning of the section, and should lead to an apportionment of liability.

[17] Provocation is defined as conduct that would cause a reasonable person to lose self control: *Hurley v. Moore* (1993), 107 D.L.R. (4th) 664, 112 Nfld. & P.E.I.R. 40 (Nfld. C.A.), at para. 38. To be recognized by the law, the provocation must occur in close proximity to the assault. Provocation can of course take many forms. It might amount to no more than taunting, insults or annoyance, in which case it is neither a tort nor a crime: see *Rumsey v. R.* (1984), 32 Alta. L.R. (2nd) 364 at para. 17; *Evans v. Bradburn* (1915), 9 Alta. L.R. 523 (App. Div.). On the other hand, provocation may arise from an assault, a trespass, or some other conduct that is a tort or crime, or both. In this case the provocation is said to be an assault.

[18] This case, of one assault leading to another, is not the only way this issue can arise. If the plaintiff breaks into the tortfeasor's house, and the tortfeasor beats him beyond what is reasonably necessary for defence of self or property, can the tortfeasor claim that the plaintiff has contributed to his own injuries? If a motorist changes lanes unsafely, so as to commit an offence under the *Traffic Safety Act*, R.S.A. 2000 c. T- 6, and at the next stop light the tortfeasor beats him in a fit of road rage, can the tortfeasor claim that the plaintiff has contributed to his own injuries? If a wife insults and enrages her husband, and he hits her, can he argue that she brought the beating on herself? If a husband finds his wife with another man, is he justified in beating his wife or her lover? Is the damage or loss "caused" by the precipitating conduct of the plaintiff? This raises issues of causation and policy.

[19] The *Contributory Negligence Act* was enacted to reverse the common law rule that a plaintiff who sued in negligence, but was himself contributorily negligent to even the slightest degree, could not recover anything. The common law did not apportion liability. While the *Act* was directed to this specific problem, the *Act* does not mention "negligence" except in the title, and uses the word "fault" instead. The law on the scope of the word "fault" is unclear. Interpreted literally, it could cover any legal or moral delict. It has been held to include breach of fiduciary duty (*Penner v. Yorkton Continental Securities Inc.* (1996), 183 A.R. 5), breach of contract (*Finance America Realty Ltd. v. Speed & Speed* (1979), 38 N.S.R. (2d) 374, 12 C.C.L.T. 4 (App. Div.)), and intentional torts like trespass (*Bell Canada v. Cope (Sarnia) Ltd.* (1979), 11 C.C.L.T. 170 aff'd (1980), 31 O.R. (2d) 571 (C.A.)).

[20] The Court of Appeal has however held that there can be no contributory negligence in deceit: *Kelemen v. El-Homeira*, 1999 ABCA 315, 73 Alta. L.R. (3d) 399, 250 A.R. 67. It is no defence that the plaintiff foolishly believed the lies told by the defendant. Likewise in *United Services Funds (Trustees) v. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322 it was held that negligence by the plaintiff is not a defence to fraud. The Court rejected a wide definition of "fault":

But I do not find anything in that chapter [of Glanville Williams, *Joint Torts and Contributory Negligence*] which supports the proposition that the English Act or any of the other Acts was intended to create a defence of want of care where none had existed before the statute.

Therefore, in my view the matter should be approached by asking whether these defendants could have raised at law or in equity any defence the rationale of which is that a man who is the author of his own misfortune cannot put his loss upon the asserted tortfeasor for that is what "fault" means in the case of a person suffering loss.

The Court limited the meaning of "fault" strictly to the situations at law where a plaintiff would be precluded from recovering because of contributory negligence. The result, if not the reasoning, was approved in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19. The fraud cases may however be seen as unique, because the essence

of fraud is to trick the plaintiff into doing something foolish, and to allow a defence of contributory negligence would be inconsistent with the tort itself. The fraud cases do however show the problems of apportioning liability in cases of intentional torts: the exercise always amounts to suggesting the victim of an intentional act is responsible for his or her own damage, even though that damage was the result intended by the defendant.

[21] In other contexts, it is no defence to an intentional tort that the plaintiff himself is a tortfeasor. If the plaintiff was injured by a spring gun, it was no defence that the plaintiff was a trespasser. An intentional injury could not be justified, even though at common law the owner of land owed a very low duty to trespassers: *Herrington v. British Railways Board*, [1972] A.C. 877 at pp. 904-6, 919. At common law contributory negligence was not a defence to an intentional tort: *Horkin v. North Melbourne Football Club Supporters Club*, [1983] 1 V.R. 153, at pp. 159-61, 164.

[22] Contribution has been ordered between tortfeasors under the *Tortfeasors Act*, R.S.A. 2000, c. T-5, in cases where one or more defendants were liable for intentional torts: *S. (C.) (Next Friend of) v. Miller*, 358 A.R. 196, 2004 ABQB 137; *Sitko v. Hartum*, 366 A.R. 75, 2004 ABQB 854, at para. 22. But these cases do not involve shifting blame for an intentional act to the party that suffered the damage, and do not engage the same concerns as using contributory negligence to shift fault to a plaintiff.

[23] In *Gordon v. Levi*, [1993] E.W.J. 693 (C.A.) the Court considered whether provocation could constitute contributory negligence. The Court discussed the unreported decision in *Barnes v. Nayer* in which years of acrimony and provocation had finally resulted in the murder of one of the plaintiff's family members by the defendant. The defendant pleaded the maxims *ex turpi causa* and *volenti non fit injuria*. The Court in *Gordon* held at para. 51:

At this point of his judgment [in *Barnes v. Nayer*] May L.J. seems to envisage that provocation might in certain circumstances amount to fault contributory to the injury caused by the trespass to the person and that it was really a question of degree or a comparison between the conduct of the victim and that of the aggressor. I regret that I find this a step which I find impossible to take. The older authorities clearly exclude provocation as a defence unless it amounts to conduct qualifying under one or other of the maxims. Thus, according to existing authority as I understand the position, for conduct to amount to fault contributing to the injury sustained, it must have a direct physical connection with the trespass concerned ("contributing fault"). It is not sufficient if the provocation derives merely from the contextual background. Thus the assaults upon the defendant or his family in *Barnes v. Nayer* were provocation but not contributory fault by the deceased or her family.

This obiter remark implies that the victim of a crime does not contribute to his or her own damage. It should also be noted that the English statute differs in some important respects, particularly that it has a definition of “fault”.

[24] A number of courts have held or assumed that provocation is “fault” within the meaning of the *Act*. The cases cover various forms of provocation: **McCluskey v. Metrotown Hotel Inc.**, [1994] B.C.J. No. 459, [1994] B.C.W.L.D. 917 (intoxicated plaintiff assaulted bouncers at bar and was beaten); **Norman v. Kipps**, [1994] B.C.J. 97 (defendant convicted for beating plaintiff after a road rage incident); **Bernitt v. Vancouver (City)**, [1997] 4 W.W.R. 505, 28 B.C.L.R. (3d) 203 at paras. 162-65, reversed on other grounds 174 D.L.R. (4th) 403, 1999 BCCA 345, action dismissed on re-trial, 2001 BCSC 1754, 209 D.L.R. (4th) 494 (plaintiff incited a riot which resulted in police battery of plaintiff).

[25] In my view provocation itself is not a “fault” within the meaning of the *Act*. There is no crime of “provocation” in the *Criminal Code*. There is no tort of “provocation”. The original purpose of the *Act* was to reverse the common law rule that if the plaintiff was contributorily negligent even to the smallest degree, the claim would fail. This rule would not have operated merely because the plaintiff had in some way annoyed or aggravated the defendant, leading to the assault, because provocation was not recognized as a tort. The true issue is whether the original assault by the Plaintiff is “fault”. Clearly an assault is a tort, and usually a crime. Where the provocation is itself a tort, then the provocation would be “fault”. The next question is whether the precipitating assault falls into the words “where by the fault of two or more persons, damage or loss is caused to one or more of them”.

[26] There are strong policy reasons for not allowing a person convicted of a criminal offence to shift the blame to the victim or other third parties. In **H.L. v. Canada (Attorney General)**, 2005 SCC 25, [2005] 1 S.C.R. 401 the plaintiff had been abused as a child, and was convicted of various crimes when an adult. In his tort action for abuse, he claimed loss of income for the time he was in prison, arguing that the abuse had driven him to a life of crime. The Court rejected this claim (at para. 137), both on grounds of causation, and on the basis that it is contrary to public policy: “. . . to compensate an individual for loss of earnings arising from criminal conduct undermines the very purpose of our criminal justice system”.

[27] The same point was made in **State Rail Authority of New South Wales v. Wiegold** (1991), 25 N.S.W.L.R. 500 (C.A.) at p. 514:

If the plaintiff has been convicted and sentenced for a crime, it means that the criminal law has taken him to be responsible for his actions, and has imposed an appropriate penalty. He or she should therefore bear the consequences of the punishment, both direct and indirect. If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal court at naught. It would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.

These cases are ones where the criminal is seeking, from a third party who has committed an unrelated tort against him, damages arising during the time he spent in prison, even though he was in prison because of his own fault. In this case the Defendant is in the reverse position: he seeks to be relieved from paying damages as a result of his criminal conduct because of the actions of the Plaintiff. Here the tort of the Plaintiff is related to the criminal conduct of the Defendant, which distinguishes the cases on damages, but there are still strong parallels between the two situations.

[28] The Courts are generally reluctant to allow collateral attacks on criminal judgments. In *Toronto (City) v. Canadian Union of Public Employees*, 2003 SCC 63, [2003] 3 S.C.R. 77 an employee had been convicted of sexual assault and fired. He grieved his dismissal, arguing that the assault had never taken place, and the arbitrator agreed with him. He argued that he was not really attacking the validity of his conviction, as he agreed it should stand, but that he was entitled to challenge its consequences for other purposes, such as its effect on his employment. The Court considered this an abuse of process, and held that no such collateral attack on the conviction was permissible. In the present case, this means that in these proceedings the Defendant could not argue that the assault never took place, or that it was not his fault. The effect of arguing that he is not fully responsible for the assault because of the provocation of the Plaintiff to some extent attacks the criminal finding that he is the one who was responsible, and so engages the principles in *C.U.P.E.*, although perhaps not as directly.

[29] One mischief that arises from allowing the defendant to shift responsibility for his crimes to the plaintiff is that it tempts the parties and the Court to revisit the findings of the criminal court. That occurred in *X. v. R.D.M.*, 2004 BCSC 1273 at paras. 241-42, where it was suggested that the plaintiff should be allowed to recover compensation for the time he was in prison, because he had been too severely punished in the criminal court, as the sentencing judge could not take into account all of the mitigating circumstances. Likewise in this case the Defendant argues that the criminal court did not take into account the provocation of the Plaintiff, as criminal courts do not deal with allocation of responsibility. This invites a reassessment of the criminal verdict, because the criminal court did consider the relative responsibility of the two parties, at least in so far as it decided that the response of the Defendant to any provocation was excessive.

[30] Generally speaking, damages in tort are compensatory and are not affected by the morality of the plaintiff's conduct. This issue was raised in *Hall v. Hebert*, [1993] 2 S.C.R. 159, where it was argued that the plaintiff's claim should be completely barred under the doctrine *ex turpi causa non oritur actio*. The plaintiff in that case claimed damages against the owner of a car, for allowing the plaintiff to drive the car when the defendant owner knew he was impaired. The defendant argued that the plaintiff's claim should be barred because he was committing the criminal act of impaired driving when he was injured. McLachlin J., for the majority, framed the issue as follows, at paras. 4-5, 11:

Whether we describe the principle under which judges are allowed to deny recovery to a plaintiff by an old-fashioned Latin name or by the currently

fashionable concept of "public policy", the underlying problem remains the same: under what circumstances should the immoral or criminal conduct of a plaintiff bar the plaintiff from recovering damages to which he or she would otherwise be entitled. . . .

My own view is that the courts should be allowed to bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct only in very limited circumstances. The basis of this power, as I see it, lies in duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand. It follows from this that, as a general rule, the *ex turpi causa* principle will not operate in tort to deny damages for personal injury, since tort suits will generally be based on a claim for compensation, and will not seek damages as profit for illegal or immoral acts. . . .

. . . As the cases illustrate, what is meant is profit in the narrow sense of a direct pecuniary reward for an act of wrongdoing. Compensation for something other than wrongdoing, such as for personal injury, would not amount to profit in this sense.

This decision of course is founded on the common law concept of *ex turpi causa*, and does not expressly address the wording of the *Contributory Negligence Act*, but the public policy involved in interpreting the *Act* is the same. In the end the plaintiff was allowed to sue, but his damages were reduced because of his contributory negligence. However in *Hall v. Hebert* the contributory negligence was directly related to the damage that resulted, the case did not involve intentional torts, the defendant had not apparently committed a crime, and the Court did not directly consider the point raised by this case.

[31] The law should obviously discourage people from provoking others in ways that might cause them to lose control. This objective must however be balanced against the competing objective of discouraging persons from responding to provocation with criminal acts. The law should not encourage self help remedies, particularly when they involve criminal acts. Self defence is permitted but not retaliation. Citizens should be expected to resist responding to provocation with breaches of the peace, particularly when the provocation is neither a tort nor a crime. Provocative assaults, such as the one that occurred in this case, should be reported to the police, or dealt with by the law of torts, not by vigilantism. Where the tortfeasor has been found criminally responsible for his acts, there is the added concern that the law of tort not undermine what the criminal court has determined.

[32] I have accordingly concluded that in these circumstances the assault by the Plaintiff, while it was "fault" under the *Act*, did not "cause" the Plaintiff's injuries. Those injuries were

caused by the separate assault of the Defendant, for which he has been found to be criminally responsible. That finding includes a finding that the Defendant had the necessary intention to deliberately inflict the assault on the Plaintiff. In tort law the Defendant's assault should be regarded as a *novus actus*, and any damage resulting from it should be seen as arising from that assault alone: *H.L. v. Canada (Attorney General)*, *supra*, at para. 142; *Rumsey v. R.*, *supra*, at para. 15. That intentional act is recognized by the law as the cause of the injuries. The damage was caused by "the conscious act of another volition", to use the words of Lord Dunedin in *Dominion Natural Gas Co., Ltd. v. Collins and Perkins*, [1909] A.C. 640 (P.C.) at pg. 646. Further, the Defendant's reaction to the initial assault was by definition out of proportion to the provocation, which again shows that it was the act of the Defendant that was the cause of the damage, not the provocation, as the provocation would only have "caused" a lesser response. Whatever the Plaintiff did was not a legal cause of his injuries. In summary, where a tortfeasor has been criminally convicted for the same intentional act for which the plaintiff sues in tort, the tortfeasor is precluded from arguing that the plaintiff's provocation contributed to his own damage.

[33] This case concerns a tortfeasor defendant who has been convicted of a crime for which the *mens rea* is intention. Different considerations may apply to crimes with a lower *mens rea*: for example, a criminally convicted impaired and negligent defendant who collides with an equally impaired plaintiff. Where the damage is not intentionally caused, and the fault of the plaintiff directly leads to the damage, the criminal conviction may not be a complete bar to apportionment. I also leave for another day the effect of intentional torts that are not crimes, or tortious acts that would have been crimes but were never prosecuted.

[34] In conclusion, the Defendant has not shown that he has an arguable defence, so for this reason as well he is not entitled to open up the default judgment.

Provocation and Damages

[35] The last issue is whether provocation reduces damages, apart from any issues of contributory negligence. There is case law that does suggest that provocation is relevant to the issue of quantum. The history of the law on the effect of provocation on damages in a tort action for battery was reviewed extensively in *Hurley v. Moore* (1993), 107 D.L.R. (4th) 664, 112 Nfld. & P.E.I.R. 40 (Nfld. C.A.), which concluded at para. 59 that the law is "befuddled". Originally provocation was accepted in mitigation of the damages from the assault. In *Lane v. Holloway*, [1981] 1 Q.B. 379, [1967] 3 All E.R. 129 the English Court of Appeal ruled that provocation could only be used to reduce aggravated and punitive damages, and not ordinary compensatory damages, following the Australian decision in *Fontin v. Katapodis* (1962), 108 C.L.R. 177 (H.C.A.). A number of Canadian jurisdictions followed this precedent. Then in *Murphy v. Culhane*, [1977] Q.B. 94, [1976] 3 All E.R. 533 the English Court of Appeal changed direction, holding that provocation could also be used to reduce compensatory damages. *Lane v. Holloway* was distinguished on the basis that the conduct of the plaintiff in that case was trivial when compared to the conduct of the defendant. Predictably, some Canadian courts continued to follow *Lane v. Holloway*, while others (including *Hurley v. Moore*) followed *Murphy v. Culhane*.

While *Lane v. Holloway* was mentioned with approval in *Hall v. Hebert*, *supra*, the Court in *Hurley v. Moore* concluded the reference was merely to the general principles stated, and not the actual result. *Hurley v. Moore* concluded that provocation is not a defence in tort, but might be used to reduce compensatory damages.

[36] In the United States the authorities are divided, but “the prevailing view is that an award of actual or compensatory damages may not be mitigated by proof of mere provocation or malice”: A.G. Nadel, *Provocation as Basis for Mitigation of Compensatory Damages in Action for Assault and Battery*, 35 ALR 4th 947 (1985), at pg. 951.

[37] While the Court in *Hurley v. Moore* did not treat provocation as contributory fault, it did (at para.72) follow an analogous approach in reducing the compensatory damages:

If provocation is a cause of the assault - a contributing factor - it is not a defence but is taken to be fault or blame on the plaintiff's side contributing to the injuries and damages that result. On this basis it is difficult to avoid the tendency to compare and scale the assault, its disproportionate aspect and resultant injuries, with the depiction and level of the provocation. What emerges from this exercise is an idea of the degree that the otherwise bona fide damages must be reduced. This is hardly a mathematical formula but the intention is unconcealed: to achieve fairness as between parties, one of whom inflicted the injuries and the other who, in part, brought it on him or herself. Ostensibly, likeness to the negligence - contributory negligence - notion cannot be missed but reference to a ratio of fault is absent.

This approach seems to incorporate contributory negligence concepts indirectly. As explained by David Cheifetz, in *Apportionment of Fault in Tort* (Canada Law Book: Aurora, Ont., 1981), at page 199:

It is suggested that the basis upon which damages in intentional torts are said to be subject to mitigation in cases of provocation by the injured person, whether mitigation applies to all damages or just to punitive damages, is a recognition that the injured person is, in some way, at fault as well. He has at least been careless of his own safety. As such, the mitigation of damages as a consequence of provocation seems to be a case of apportionment of damages at common law. Provocation is merely disguised contributory fault, but it is improper conduct of a degree greater than mere carelessness of one's own safety. This is how contributory fault and provocation mesh. Provocation is flagrant contributory fault – something more than mere carelessness for one's own safety.

Because of the viciousness of the assault, and because the provocation was somewhat spent when it occurred, the Court in *Hurley* reduced the general damage award by 20%.

[38] A number of Canadian appellate courts have now ruled that provocation is properly used to reduce compensatory damages for assault: *Hurley v. Moore*, *supra*; *Nichol v. MacKay*, 1999 NSCA 112, 180 N.S.R. (2d) 76; *Bruce v. Coliseum Management Ltd.*, [1999] 4 W.W.R. 178, 56 B.C.L.R. (3d) 27, 113 B.C.A.C. 113. The Ontario and Manitoba position is that provocation can only be used to reduce aggravated and punitive damages: *Shaw v. Gorter* (1977), 77 D.L.R. (3d) 50 (C.A.); *Landry v. Patterson* (1978), 22 O.R. (2d) 335 (C.A.); *Check v. Andrews Hotel Co.*, [1975] 4 W.W.R. 370 (Man. C.A.). In Alberta the position appears to be that provocation is a discretionary factor in reducing compensatory damages. In *Kuehn v. Hogen*, [1997] A.J. No. 982 the plaintiff sued the defendant who had hit him with a two-by-four and broken his elbow. There was a long-standing dispute between the two parties, but the particular provocation relied on by the trial judge to reduce damages was described as “the manner in which the respondent was clearing and banking snow from his driveway”. It is not clear if this amounted to the tort of trespass or not. The Court held at para. 9:

On an examination of the totality of the judgment, it is clear that the trial judge found there was provocation, understood that in law it was not a defence but that he could take it into account in awarding damages. He then did take it into account before setting the quantum of damages. The appellant has not convinced us that he fell into any reviewable error.

An earlier case to the same effect is *Evans v. Bradburn* (1915), 9 Alta. L.R. 523 (App. Div.) where the assault occurred after the plaintiff called the defendant a liar. The law in Alberta is therefore that provocation may, in the discretion of the trial judge, be used to reduce compensatory damages for assault, even where the assault was criminal in nature, although there was apparently no criminal prosecution in *Kuehn*.

[39] The decision in *Kuehn v. Hogen* is binding on trial courts in Alberta, and the Defendant is entitled to raise provocation at the assessment of damages in this case. I note however that this rule does not fit well with the principles on which damages are awarded in tort. The provocation in *Kuehn* was not a crime, and possibly not even a tort. The decision is inconsistent with the rule in *Hall v. Hebert*, *supra*, that the morality of the plaintiff's conduct is not a factor in compensatory damages. It is inconsistent with the general rule that a tortfeasor is responsible for all damage caused by an intentional tort, and issues of foreseeability do not arise: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at para. 53. It is inconsistent with the reasons previously discussed why a convicted tortfeasor should not be allowed to argue the plaintiff was at fault. It seems to grant a trial judge a discretion in the calculation of damages which is otherwise absent. Finally the rule is generally inconsistent with the rule that damages for tort are compensatory in nature, and incorporates non-compensatory factors into the calculation: *Lane v. Holloway*, *supra*.

[40] All the cases agree that provocation might well be relevant to aggravated or punitive damages. Aggravated damages (unlike punitive damages) are compensatory in nature. They are awarded in cases where the damage is inflicted in a particularly egregious fashion: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at para. 53. It follows that if the assault was provoked, the assault might be less egregious, and aggravated damages might be reduced or eliminated. The Plaintiff

does not, however, appear to be advancing a claim for aggravated damages. There is a claim for punitive damages, which might be precluded by the criminal conviction, or otherwise affected by the provocation.

Summary

[41] To summarize, where the defendant has been convicted of an intentional criminal act, the defendant cannot obtain apportionment for fault against the plaintiff in a tort action based on that same act. The law in Alberta is however that provocation is relevant in calculating damages in tort, and the defendant can raise the issue of provocation at the damage assessment. Since a defendant can appear and make submissions on the quantum of damage, notwithstanding that the defendant has been noted in default or is the subject of a default judgment, it is not necessary to open up the default judgment in order for the Defendant to make his arguments about provocation at the assessment hearing. However, if the Defendant did have to open up the default judgment, he would not be permitted to do so, as he has not met the relevant test.

[42] Since neither counsel cited the binding decisions of the Court of Appeal (or indeed, any authority at all), neither party is entitled to costs of this motion.

Heard on the 21st day of December, 2005.

Dated at the City of Edmonton, Alberta this 10th day of January, 2006.

Frans F. Slatter
J.C.Q.B.A.

Appearances:

Charles E. Campbell
for the Plaintiff

David L. Schwartz
for the Defendant

TAB 12

In the Provincial Court of Alberta

Citation: Lepine v Sherwood Park Dodge Chrysler Jeep Ltd., 2018 ABPC 12

Date: 20180119

Docket: 1603600083

Registry: Sherwood Park

Between:

Archie Nelson Lepine

Plaintiff

- and -

Sherwood Park Dodge Chrysler Jeep Ltd.

Defendant

Reasons for Judgment of the Honourable Judge J. Maher

Introduction

[1] This is the story of a fraud. Actually, it is the story of two frauds – a major fraud and a minor fraud, the minor fraud (a “straw purchase” fraud) used to facilitate the major fraud. The plaintiff is the victim of the major fraud. Ironically, the defendant is the victim of the minor fraud.

[2] It is the story of the purchase of a truck by the plaintiff from the defendant on or about November 8, 2014, the defendant being a motor vehicle dealership. Only two persons testified: the plaintiff and the defendant’s then Finance Manager.

[3] A salesman employed by the defendant, a retired peace officer, was peripherally involved in the matter leading to the fraud, but his absence at trial was explained by the fact that he was then, and had been for two weeks, in a coma confined in an intensive care ward in hospital. His testimony might have been of some assistance in determining the purchase details more precisely. I will refer to him as “the salesman”.

[4] One of the Sales Managers of the defendant at the time was the actual fraudster. He has disappeared. It is therefore no surprise that I do not have his evidence. I will refer to him as “the fraudster”.

[5] The last character in the story is a second salesman. On the basis of the testimony of the Finance Manager, he was a participant in the minor fraud although he may have gained nothing from it. I will refer to him as “the straw man”.

[6] Neither party explained their failure to call the straw man at trial, although there is evidence that as recently as early 2016 he was in the Edmonton area living and working. His testimony would have been of considerable assistance in providing direct evidence as to how the minor fraud was perpetrated.

Credibility

[7] The credibility of any witness depends upon two factors: their honesty and their reliability. I found both witnesses to be honest. It is important to say this because the Dispute Note made allegations suggesting the plaintiff was a party, if not to the fraud he complained of, to the minor fraud. Regrettably, these allegations continued during his cross-examination. Fortunately, it was not pursued during argument. The Finance Manager accepted the plaintiff’s honesty when the fraud was discovered, and the two unsuccessfully attempted to resolve the matter in a manner acceptable to both parties. The plaintiff’s integrity was not questioned then, and I have no reason to question it now.

[8] However, reliability is another matter. While the testimony of the two witnesses do not totally accord with each other, the variations are significant in determining the chronology of the events that consisted of and described the fraud.

[9] The plaintiff had been unemployed for six months in November 2014, but had a time limited job offer that required him to have a truck. He had purchased a truck from the defendant three years earlier. He had a casual acquaintance with the fraudster. They saw each other from time to time before the fraud. Their wives were acquaintances, and their children played together. The two and their spouses had dined together at least once.

[10] The fraudster was aware of the plaintiff’s work situation, and was aware of the fact that the plaintiff was coming to the defendant’s dealership to look at purchasing a truck the day the plaintiff did arrive. While the plaintiff did not say so, he reasonably would have anticipated that the fraudster would be the person negotiating any sales contract, notwithstanding that there were two Sales Managers.

[11] The plaintiff had every confidence, and reasonably so, that he would be treated fairly by the defendant’s representatives.

[12] His unbounded naivety, urgent desperation and high confidence in the defendant, particularly in the fraudster, explains in part why he acted the way he did. It also explains why I find his recital of the circumstances less reliable than that of the Finance Manager where their testimony conflicts. The plaintiff’s sole focus was in acquiring a suitable truck as soon as possible. The other details of his negotiations were at the time of relatively little importance to him.

[13] Further, his testimony on details, particularly in terms of time sequence and the involvement, if any in November 2014, of the Finance Manager, is inherently inconsistent and contradictory.

[14] There is another important reason why I prefer the testimony of the Finance Manager. It is that the plaintiff's recollection of events makes it extremely difficult to understand how the fraud actually was engineered in the way it was. If, on the other hand, the testimony of the Finance Manager is preferred to that of the plaintiff where their testimony conflicts, the entire sequence of events makes sense.

Facts

[15] With those reservations in mind, I make the following findings of fact, commencing with an outline of the defendant's general procedures and processes.

The Defendant's General Procedures

[16] The defendant's sales operational hierarchy was led by a General Manager, followed by the two Sales Managers, then the Finance Manager and finally the salesmen. Importantly, the Sales Managers were the Finance Manager's superiors.

[17] A sale normally began with a salesman talking with a prospective buyer. The salesman could not make a sale by himself, although the price and any financing terms might be discussed. Once a particular vehicle or type was identified, the next step in negotiating a sale was for the salesman to introduce and hand-off the prospective buyer to a Sales Manager.

[18] The negotiation on behalf of the defendant for the sale of a particular vehicle was performed entirely by one of the Sales Managers. If it was a cash sale, the sale ended there. The Bill of Sale, provided by the defendant, would be signed by the buyer and the Sales Manager. A bank draft, cheque and/or cash comprising the purchase price would be handed by the buyer to the Sales Manager; and the Bill of Sale, other concluding documents and keys would be delivered by the Sales Manager to the buyer. The salesman would escort the buyer to the newly purchased vehicle and the buyer would drive away. The Sales Manager would then process within the defendant's offices the defendant's copy of the Bill of Sale and the exchanged purchase money. The Finance Manager was not involved at all in any cash sales.

[19] If the sale was to be financed, after the terms had been agreed upon by the buyer and the Sales Manager subject to approved financing, the Sales Manager would assist the prospective buyer to fill out appropriate credit application forms, and fill out a form outlining what had been agreed to, including price, all subject to financing approval. He would then introduce and hand-off the prospective buyer to the Finance Manager together with the completed forms. The Finance Manager would review the documents, discuss financing with the prospective buyer, ascertain whether the prospective buyer wished to purchase protection plans for his health and life as well as treatments to the vehicle to be sold. The Finance Manager would then either approve the sale and its financing on the terms which had been agreed upon by the Sales Manager, or the negotiations would end – temporarily or permanently. If financing was approved, the Bill of Sale and financing documents would be prepared by the Finance Manager who would sign on behalf of the defendant. The buyer and the Bill of Sale and financing and other documents would then be returned to either the Sales Manager or the salesman.

[20] The defendant's Bills of Sale and financing documents were computer generated and printed. Other than the boiler plate wording, the variable terms were printed in bold face, and were easily visible and stood out to the eye. Once those documents were completed, only certain variables could be changed or manipulated on the computer later, and then only before the contents were locked down. One item that could not be later changed or manipulated on the computer was the date of the transaction. The name of the buyer could be manipulated - either changed completely or a co-buyer added. Only certain persons could change or manipulate the contents of the computer: the General Manager, the Sales Managers and the Finance Manager.

[21] On average, the defendant concluded about two financed sales each business day.

[22] With respect to financed sales, only the Finance Manager could print from the computer copies of a Bill of Sale and financing documents at a later date. However, a Sales Manager could request such printing, and of course having regard to the defendant's hierarchy of authority, such a request carried great weight. About 100 requests for copies of documents from the computer at a later date were made over the course of a year. The usual reason was that documents were lost or misplaced.

The Major Fraud

[23] The plaintiff, desperate to purchase a truck, on or about November 8, 2014 attended the defendant's premises and met the salesman. Together they looked at a number of trucks. The plaintiff settled on one and then was introduced to the fraudster to negotiate a price and terms of payment for the selected truck. At the time of introduction the fraudster indicated that he knew the plaintiff "like family" and that the plaintiff would be treated well.

[24] The plaintiff and the fraudster met in the fraudster's office. The fraudster was aware that the plaintiff was desperately in need of a truck for employment and that he had been unemployed for a considerable period of time.

[25] A price was agreed upon. A down payment or deposit of \$20,000 was discussed, as well as potential terms of financing the balance through the Royal Bank, subject to the approval of the Finance Manager. The plaintiff filled out a credit application.

[26] The plaintiff testified that he was then introduced to the Finance Manager. The Finance Manager denied that. I find the testimony of the plaintiff somewhat confusing and inconsistent on this. I prefer the testimony of the latter, being satisfied that the plaintiff is confusing that event with his earlier purchase of a truck from the defendant in 2011.

[27] The fraudster left the plaintiff, ostensibly to take the proposed financing to the Finance Manager for approval, contrary to the defendant's usual process. I am satisfied the fraudster did not in fact take it to the Finance Manager, although it is not crucial to my other findings of fact.

[28] Regardless of any such meeting or meetings with the Finance Manager, the fraudster returned to the plaintiff a few minutes later and advised the plaintiff that conventional financing with the Royal Bank could not be obtained. However, the fraudster represented that if the down payment or deposit were to be increased by \$5,000, financing could be secured, through a different financial institution, a sub-prime lender, which was just commencing business and which the defendant was using as a backup lender. He even showed the plaintiff what purported to be a website of this new lender. He also indicated that while more money was required as a down payment or deposit, the backup financing of monthly payments of \$650.00 carried no

interest obligations. The previously agreed upon price was either confirmed or adjusted by agreement.

[29] The lack of any interest on the outstanding balance appealed to the plaintiff and he and the fraudster quickly agreed upon the terms of sale.

[30] The plaintiff testified that he then met with the Finance Manager. However, as before his testimony was denied by the Finance Manager, and was clearly inherently inconsistent and contradictory. As before, I reject his testimony in that regard.

[31] After reaching that agreement, and possibly filling out a further credit application which the plaintiff left with the fraudster, the fraudster told the plaintiff to return with a bank draft in the sum of \$25,000 made payable to the fraudster and 18 post-dated and signed cheques in the sum of \$650 each with the name of the payee left blank.

[32] The fraudster explained that the bank draft should be in the fraudster's name because the new sub-prime lender was still in the process of establishing itself, and that the fraudster would stamp the name of the new sub-prime lender as payee on the post-dated cheques once the lender was established.

[33] The plaintiff claims he left the dealership with a Bill of Sale, which I will refer to hereafter as "the plaintiff's Bill of Sale", reflecting the price that had been agreed upon and had been signed by the Finance Manager. He says he attended upon his credit union and secured the bank draft and 18 post-dated cheques as instructed by the fraudster.

[34] Once again, I conclude that the plaintiff did not then leave the defendant's premises and the fraudster with any Bill of Sale, let alone one signed by the Finance Manager. It makes no sense in the chronology of the scheme by which he was defrauded. It is denied by the Finance Manager, and it was not necessary in order to obtain the bank draft because the plaintiff used a savings account to provide the \$25,000. Nor would a Bill of Sale have been signed by the defendant without the \$25,000 having first been paid.

[35] The plaintiff conceded that the request relating to the names of the payees in both the requested bank draft and post-dated cheques was "odd" and "weird". However, he also testified that "I had no reason to disbelieve" the fraudster; that he "had no reason to believe" that the proposal was not legitimate; and that he was relying on an acquaintance, a dealership he dealt with before and a salesman who was a former peace officer.

[36] Even so, the plaintiff consulted his wife because of the unusual arrangement concerning the payees. She suggested the fraudster was simply doing him a favour.

[37] The plaintiff is no neophyte when it comes to business and financing. He owns his own home and has owned at least two rental properties, one of which was foreclosed in British Columbia, as a result of which he still has a significantly large judgment debt. He has financed the purchase of large assets in the past.

[38] The plaintiff testified that he returned the same day, he says November 8, to the defendant's premises with the requested bank draft and post-dated cheques and delivered same to the fraudster. Once again, his testimony is contradicted by the Finance Manager, who suggested that it could not have been November 8 but had to be later, because a Bill of Sale for the straw man on the same truck was completed that date, and for technical and location reasons, it had to be later than November 8. I accept that to be the case. I conclude that the plaintiff returned to the

defendant and the fraudster a few days later, and that he is conflating that date with the date of the bank draft.

[39] At the time of his return to the fraudster, later than November 8, the plaintiff delivered the bank draft and post-dated cheques to the fraudster. The latter provided him with the plaintiff's Bill of Sale.

[40] Another flaw with the plaintiff's testimony on timing and the sequence of events, is that inconsistently with his earlier testimony, he also testified that he received his Bill of Sale upon delivering the bank draft and post-dated cheques. I note that if the plaintiff had already received the plaintiff's Bill of Sale before he obtained the funding, there is no reason why he would have received it a second time. I am satisfied that it was only upon his return and delivery of the bank draft and post-dated cheques to the fraudster that he received the plaintiff's Bill of Sale.

[41] The plaintiff's Bill of Sale is dated November 8, and is signed by the plaintiff and by the Finance Manager on behalf of the defendant.

[42] It makes no reference to the down payment or deposit of \$25,000. There is no reference to the new sub-prime lender although there is reference to the Royal Bank as the lender. The Bill of Sale refers to the fact that there are four copies. The plaintiff's Bill of Sale handed to him consists of all four copies, begging the question as to why the defendant did not keep a copy for itself.

[43] None of those irregularities according to the contract between the plaintiff and the defendant were noticed by the plaintiff. He says all he saw was the agreed upon purchase price.

[44] No financing documents were delivered to the plaintiff by the fraudster, although one would reasonably expect that they would be, even on a temporary basis.

[45] The fraudster also provided the plaintiff with the keys to the truck. The plaintiff left the dealership and happily drove the truck for 13 or so months without any problem whatsoever.

[46] His happiness would have dissipated quickly, had he read the Bill of Sale beyond observing the purchase price.

[47] Nor did the plaintiff pay much more than cursory attention to his own banking. Had he done so he would have noticed that as well as the bank draft for \$25,000 made payable to the fraudster, 13 of the monthly post-dated cheques he had provided to the fraudster and which had been cashed, the last one dated December 1, 2015, were all made payable to the fraudster or the fraudster's wife.

[48] The plaintiff testified that on a couple of occasions he asked the fraudster for a statement showing the balance owing on the truck. None was provided. The plaintiff did not follow up.

[49] The plaintiff rationalized his failure to pay closer attention to his banking by explaining that neither the originals nor copies of negotiated cheques and the like were returned to him by the credit union, and while he could examine them online, it was not his practice to do so.

[50] The fraudster kept the down payment or deposit and the proceeds from the 13 cashed cheques, of the 18 post-dated cheques the plaintiff had given to him, all for his own benefit.

[51] Unlike those cases where the fraud occurred when the victim was induced to enter into a contract by false representations or deceit, the fraud here was the conversion or misappropriation of the down payment or deposit and the cashed cheques by the fraudster.

Discovery of the Major Fraud

[52] The plaintiff's bliss ended in early December 2015, the day he returned two telephone messages he had received from the straw man warning that there was problem and that the truck could potentially be seized. In the return phone call, the straw man advised the plaintiff that "as a favour" to the fraudster, the straw man had agreed to take out a loan from the Royal Bank on the plaintiff's truck. The straw man understood that the fraudster would collect from the plaintiff the monthly payments on the loan and remit them to the straw man, so that the straw man could in turn make the payments to the Royal Bank under the loan. The straw man continued to explain that he had not received any money for about three months from the fraudster, so the loan to the Royal Bank was in default. The Royal Bank was threatening to seize the truck under the financing contract, being a conditional sales contract.

[53] The straw man unsuccessfully urged the plaintiff to provide the straw man with more funds to avoid that possibility.

[54] On March 3, 2016, the Royal Bank did seize the truck, and sold it without the plaintiff having filed a Notice of Objection. The plaintiff had enjoyed the exclusive use of the truck for almost 16 months before then.

[55] Rather than remit more money to the straw man, the plaintiff contacted the defendant and spoke at length with the Finance Manager. He learned then, that the fraudster had been fired by the defendant months earlier. As noted, the plaintiff and the Finance Manager explored options to resolve the matter to the satisfaction of the parties, but the discussion terminated when the plaintiff insisted upon the return of his \$25,000 down payment or deposit and all of the \$8,450 he had made in monthly payments from the date of purchase.

[56] The Finance Manager testified that the plaintiff's claim came as a surprise to the defendant. While he also testified that the fraudster had been fired, there is no evidence as to the reason, or for that matter that there was any hint of dishonesty on the fraudster's part, known to the defendant before the plaintiff initiated his complaint. I conclude that this fraud upon the plaintiff was a one-off as far as the defendant knew or ought to have known. There is no evidence that the defendant knew or ought to have known that the fraudster lacked honesty at any time before the plaintiff contacted the Finance Manager in December 2015.

The Minor Fraud

[57] Because the plaintiff alleges that the defendant is vicariously liable for the fraud perpetrated upon him by the fraudster, how the fraud was executed is relevant.

[58] Carlo Ponzi and Bernie Madoff would not have approved of its manner of execution, simply because, unlike their own frauds, this fraud was doomed to fail and to fail soon. Its early discovery was a certainty. It would only be a matter of time. That it was not discovered sooner was only because of the plaintiff's failure to pay attention to what was going on. For that reason, as disappointed in its execution as they might have been, they might well have applauded the fraudster for the audaciousness of it. It was bold. It was brazen.

[59] The fraud occurred through the facility of using a "straw man" as the purchaser of the very truck the plaintiff purchased at the very purchase price agreed upon by the plaintiff.

[60] Using a straw man as a purchaser is known in the motor vehicle retail sale industry as a “straw purchase”, either legitimately or fraudulently, fraudulently in two ways: to defraud the dealership or to defraud a lender.

[61] The defendant, as apparently do other motor vehicle dealerships, offers its employees a significant discount when those employees purchase a vehicle for their own exclusive use. The discounted employee price may or may not be as low as the actual dealer cost for that particular vehicle, but it is a price certainly not available to the ordinary purchaser. It is understood between dealer and employee that the discount is for the benefit and only the benefit of the employee. For an employee to purchase a vehicle at employee price for some other person, where the employee is but a “straw man”, is considered unacceptably dishonest. In such a case, it is the dealership that is defrauded.

[62] Similarly, a “straw man” may be shown as the purchaser and credit applicant where it is anticipated that the real purchaser would be unable to independently obtain financing. In such a case, it is the lender that is defrauded.

[63] I conclude by inference that in this case, the fraudster approached the straw man, and convinced him that he should ostensibly purchase the truck the plaintiff was interested in at the employee price while obtaining financing approval for the full price. It is not difficult to envisage a salesman accommodating his Sales Manager, particularly as in this case where the salesman is a new employee, notwithstanding the fact that it amounts to a fraud upon his employer. There may have been other inducements offered, but that would be speculative.

[64] Regardless, I conclude that the fraudster assured the straw man in some manner that the fraudster would see to it that the payments called for in the financing arrangement with the Royal Bank were made to the straw man.

[65] The testimony of the Finance Manager was that in this case the price for the sale of the truck in question to the straw man was an employee price, and that the purchase was intended to be discounted from the normal price one would expect because the straw man was an employee. Hence, the defendant was in the end itself defrauded.

[66] The fraudster, with or without the straw man, drew up an agreement as to the terms of the ostensible sale of the truck to the straw man, as well as a credit application. Those documents accompanied the straw man who met with the unwitting Finance Manager.

[67] The Finance Manager approved the sale. He entered the terms in the computer and printed a Bill of Sale (the “straw Bill of Sale”) and related financing documents (including a conditional sales contract for the full purchase price in favour of the Royal Bank). He and the straw man signed the documents including the straw Bill of Sale.

[68] The Finance Manager delivered the straw Bill of Sale and the related financing documents to the straw man, who in turn, as anticipated by the fraudster, handed them over to the fraudster.

[69] The Finance Manager then proceeded to process the conditional sales contract with the Royal Bank. In due course, the Royal Bank paid the defendant the full discounted purchase price.

[70] As of November 8, when the signed documents relating to the sale to the straw man were delivered to the fraudster, there was only one Bill of Sale, the straw Bill of Sale.

[71] I further conclude that all this took place on November 8, while the plaintiff was away securing the \$25,000 down payment or deposit and the 18 post-dated cheques.

Marriage of the Two Frauds

[72] To perfect the fraud on the plaintiff, the fraudster then accessed the computer and altered the name of the buyer in the straw purchase, by adding the plaintiff as a co-buyer. He was also able, to hide the identity of the straw man. Accordingly, if the computer printed off the Bill of Sale as altered, the only change would be the name of the buyer. In all other respects, it would have been identical to the straw Bill of Sale. Had the fraudster been able to print the altered straw Bill of Sale to create a paper copy, I expect that he would have; but he could not. Only the Finance Manager could. The fraudster had to convince the Finance Manager to print it.

[73] The Finance Manager confidently testified, and I accept it as fact, that after November 8, and most certainly in any event after the straw purchase was completed, and the computer data had been altered as described, the fraudster approached the Finance Manager who at that moment was busily engaged with another customer. The fraudster forcefully and rudely insisted that the Finance Manager print a copy of the altered Bill of Sale because it was needed immediately. The fraudster provided only the customer number and not the name of the straw man. At the insistence of the fraudster of immediate action the Finance Manager did print off a copy of the altered straw Bill of Sale, which printed copy, showing the plaintiff as the buyer, became the plaintiff's Bill of Sale. Because of course no signature was on the Bill of Sale once it was printed, the Finance Manager signed it as a matter of course.

[74] After it was printed, signed and delivered to the fraudster, the fraudster simply went back into the computer and corrected the entry to show the straw buyer as the only buyer.

[75] By the time the plaintiff returned with his down payment and monthly post-dated cheques, the straw man had purchased the truck the plaintiff was to purchase - but had done so as a straw man on behalf of and for the benefit of the unwitting plaintiff. However, he did so on markedly different terms than had been agreed to between the fraudster and the plaintiff before the former sent the latter away to secure the down payment or deposit.

[76] When the plaintiff returned with the down payment or deposit and the 18 post-dated cheques, the fraudster had the plaintiff sign the plaintiff's Bill of Sale and exchanged it and the keys to the truck for the bank draft and cheques.

[77] The Finance Manager testified that he did not check the defendant's records any further to determine the name of the buyer, which, if he had, would have disclosed that it was the straw man. Hence, the defendant was unaware of the plaintiff until December 2015 when the plaintiff complained to the Finance Manager. Nor would it be aware since it had been paid the full purchase price by the Royal Bank.

[78] Was the straw man a party to the fraud perpetrated upon the plaintiff? I do not so find. While I could infer that he was a co-conspirator, I decline to do so for a number of reasons. First, there is no evidence that he was. Second, as described, there may have been good reason why he participated as a straw man limited to defrauding the defendant or the Royal Bank, without knowing that the scheme was part of a scheme to further the major fraud. Third, his contacting the plaintiff was remarkably inconsistent with him being party to a fraud upon the plaintiff. If he was involved, it simply makes no sense that he would contact the plaintiff instead of simply

laying low. The straw man later explained his actions to the Finance Manager as merely accommodating the fraudster as a favour. Notwithstanding the suspicions of the plaintiff, I am unable to conclude that the straw man knew of the major fraud.

[79] Over the course of about the next 10 months, the fraudster cashed the plaintiff's monthly post-dated cheques, and remitted the funds, as well as a top up to meet the higher payments required by the Royal Bank under the conditional sales contract, until three months before the end, enough money to the straw man. The straw man made the topped up payments to the Royal Bank. Only when the fraudster stopped making any payments to the straw man, did the latter stop making payments to the Royal Bank, which in turn led to the threats from the Royal Bank to the straw man that the truck would be seized. By then 13 of the monthly post-dated cheques, each in the sum of \$650 had been cashed, for a total of \$8,450.

Extent of the Minor Fraud

[80] The extent of the fraud upon the defendant is relevant to some of the submissions made by the parties as to the assessment of damages. As noted, the sale price of the truck was an employee price, discounted from the normal price one would expect the truck would sell for to a member of the public such as the plaintiff.

[81] That leaves the issue as to what that normal price might be. The sale price was \$47,866.25 plus taxes for a total of \$50,758.38. The Finance Manager testified that it could have sold the truck for \$10,000 more to a member of the public, \$58,000 to \$59,000, the so-called "manufacturer's suggested retail price". He was not clear as to whether those amounts included taxes.

[82] However, there is much more to it than that.

[83] On questioning by the Court, he clarified his answers by indicating that the manufacturer's suggested retail price would be reduced by manufacturer's rebates the defendant might be able to obtain, and I am satisfied from his answers that those rebates could vary considerably. Further, he indicated that from time to time vehicles sell for even less than the employee price. Dealerships including the defendant can actually lose money on an individual sale. Consequently, there is a wide range of prices the plaintiff might have had to pay if he were obliged to pay more than he agreed to pay.

[84] It seems to me that the ultimate sale price may be affected by factors other than manufacturer's rebates: the time of the season, the day of the month, the recent history of sales volumes measured by vehicle and profit, the availability of product, the product inventory on hand, etc., etc.

[85] Importantly, the Sales Managers were given wide latitude in deciding what exact price could be agreed upon. In those instances where there was a cash sale without financing, the Sales Managers could agree to a price without reference to anyone else. Even in the case of financing, subject to the availability of financing in any particular case, it was the Sales Managers who bargained and agreed upon the price on behalf of the defendant.

[86] Finally, the Finance Manager testified that it was the objective of this defendant not merely to sell cars, but to provide customer satisfaction by setting itself apart from other dealerships. That objective is attainable by providing moderate if not minimal pricing compared to the competition.

[87] For those reasons it is difficult to know exactly what the price might have been were it not for the minor fraud. However, the fact that the fraudster did use the device of a straw man purchase convinces me that the plaintiff paid a price less than he otherwise would have had to pay. How much higher than that price, \$50,758.38, is somewhat speculative.

[88] The fact that there was a minor fraud may well explain the defendant's suspicion that the plaintiff was part of the minor fraud and also explain its reluctance to resile from that position.

Liability

[89] The plaintiff alleges the defendant is liable on three grounds.

Contract

[90] From the foregoing recital of facts as I have found them, I conclude that there was a contract between the plaintiff and the defendant in that the essentials of a contract were agreed upon: the property to be purchased, the parties and the price. It is also clear that the defendant was unable to provide clear title to the truck, it having been encumbered as a result of the minor fraud.

[91] It is clear that rescission is not the appropriate remedy for two reasons. The truck had been used for 16 months. More significantly, the truck is no longer available to be returned to the plaintiff. The parties cannot be returned to the position they were in at the time of the sale. However, damages in lieu of rescission are available to the plaintiff as a remedy.

Negligence

[92] I am not persuaded that the defendant was on its own account negligent. There is no evidence that at any time before the fraud became apparent to the plaintiff, the defendant was aware of any dishonesty in inclination or deed by the fraudster. As noted, he was fired months before the fraud was discovered, but the evidence does not satisfy me that his termination was related to his integrity as distinct from another cause. Even if that was the reason, there is no evidence that in November 2014 or for that matter most of the next year, the defendant knew or should have known of the fraudster's dishonest propensity or acts.

[93] Similarly, there is no evidence that the defendant failed to exercise due diligence in setting up and monitoring its internal controls to prevent fraud. As I said earlier, the fraud perpetrated was so audacious with the certainty of discovery at some near point in time, it beggars my belief that the defendant would have anticipated what actually occurred. I am not satisfied that the defendant lacked due diligence in terms of establishing and monitoring internal theft controls.

Fraud

[94] The elements of civil fraud were set out by the Supreme Court of Canada in *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8 at paragraph 21:

From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant

(whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[95] This is not a case of fraud by misrepresentation inducing the plaintiff to enter into a contract. The misrepresentation was with respect to the handling of the bank draft and post-dated cheques.

[96] I am also satisfied that the fraudster was the only perpetrator of the fraud against the plaintiff, and that he did so solely for his own personal benefit. Moreover, in perpetrating that fraud he also perpetrated a minor fraud against the defendant.

Vicarious Liability

[97] Whether the defendant is vicariously liable for the fraud of its employee, may be determined where there are precedents that clearly show whether vicarious liability exists or does not exist. Counsel have been unable to provide me with any such precedents and I have not been able to find any myself.

[98] In such circumstances where there are no such precedents, vicarious liability will be imposed for employee acts which are authorized by the employer and for unauthorized acts so connected with authorized acts that they may be regarded as modes, even improper modes of doing an authorized act.

[99] The Supreme Court of Canada in *Bazley v Curry*, [1999] 2 SCR 534 (SCC) set out the principles which should guide a court when determining whether unauthorized intentional acts should attract liability on the part of an employer. At paragraph 41 the Supreme Court set out three principles:

(1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".

(2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

(3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:

- (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
- (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
- (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- (d) the extent of power conferred on the employee in relation to the victim;
- (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[100] There are significant connective factors in my view which exist in this case between the risk and the harm.

[101] The loss or harm was occasioned in the defendant's normal course of business, it occurred on the defendant's premises where the fraudster was working, and it occurred at the hands of the fraudster doing what he normally did at work: negotiating and concluding the sale of motor vehicles. It occurred when the fraudster was aware of the plaintiff's particular vulnerability - the plaintiff needed a truck and needed it now.

[102] It is relevant that the defendant would normally benefit from the sale of the truck. That the defendant itself was defrauded at the same time is not in my view relevant to the issue of whether it is vicariously liable. In the normal course of events the defendant would have gained from the sale of the truck, even if it had decided to sell at a loss. Indeed, while the purchase price was fraudulently discounted, the defendant did in fact receive the full discounted purchase price from the Royal Bank. In other words it suffered no loss other than the discount.

[103] In my view, the defendant should in this case be found vicariously liable for the acts of the fraudster.

Vicarious Liability and Contributory Negligence

[104] Having concluded that the defendant is vicariously liable for the acts of its employee fraudster, I address the remaining issues on liability: whether the plaintiff was contributorily negligent which led to his loss and, if so, whether any such contributory negligence falls within the meaning of the *Contributory Negligence Act*, RSA 2000, c. C-27, in the case of fraud.

The Plaintiff's Contributory Negligence

[105] In my view, the plaintiff contributed to his own loss by failing in many ways to reasonably attend to his own financial welfare. Had he but done one of several things that a reasonable buyer in the same circumstances would have done, the fraud would have been avoided

[106] First, the plaintiff did not merely fail to read the proverbial fine print in the Bill of Sale (thereby noticing that he had all four copies of it, meaning, quite unusually, that the defendant had none). I acknowledge that even lawyers, and I daresay judges, do not always read fine print.

[107] However, this plaintiff's failure was markedly greater. He failed to read the large print, the bold print, the print that showed that he was not credited with nearly one-half of the purchase price - \$25,000, a significant sum of money.

[108] Second, he failed to insist upon receiving copies of the financing documents at the time he left the fraudster with the keys to the truck, or at any time thereafter. He must have known that there would be documents relating to the financing, and a prudent buyer would want those documents for a variety of reasons.

[109] Third, he failed to check his bank records to see whether the negotiated post-dated cheques were properly made out to the lender.

[110] Fourth, he failed to contact the lender to ascertain whether he had been properly credited with the payments he had made.

[111] Fifth, and most significantly, all of these failures occurred in the context that even in his own mind he considered it "weird" or unusual that the name of the payee of the bank draft was the fraudster and not the seller. While he might well have had reason to believe that the payee in the post-dated cheque should be left blank, there was no reason whatsoever to make the bank draft payable to the fraudster instead of the seller. Nor was a possible reason offered.

[112] There were two other material contextual factors. While the fraudster may well have been known to the plaintiff, they were not related; and there appears to have been no previous business or legal relationship between them - only a social one and a limited social one at that.

[113] Nor is there any suggestion that the plaintiff suffered to any degree some form of a disability or disadvantage vis-à-vis the fraudster. The plaintiff was not a neophyte when it came to the purchase of real estate or motor vehicles where the purchase was financed.

[114] In my view, the plaintiff was negligent and that negligence contributed to his loss.

Principle and Policy Reasons To Ignore Contributory Negligence Where Fraud

[115] Profound reasons have been articulated as to why contributory negligence should not apply to cases where the plaintiff has been defrauded. The leading case in Canada articulating those reasons is *Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 SCR 678 (SCC), where Binnie J., at paragraphs 69 and 70, said the following for the Court:

[69] The appellants' concept of a due diligence defence in a fraud case was rejected over 125 years ago by Lord Chelmsford L.C. who said, "when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty'": *Central R. Co. of Venezuela v Kisch* (1867), L.R. 2 H.L. 99, at pp. 120-21.

[70] Lord Chelmsford's strictures were quoted and applied by Southin J. (as she then was) in *United Services Funds (Trustees of) v Richardson Greenshields of Canada Ltd.* (1988), 1988 CanLII 2955 (BC SC), 22 B.C.L.R. (2d) 322 (S.C.),

where she observed that “[c]arelessness on the part of the victim has never been a defence to an action for fraud” (p. 335).

Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.

And, in my opinion, a good thing, too. There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of “Ha, ha, your own fault, I fool you”. Such a defence should not be countenanced from a rogue. [p. 336]

See also *Dalon v Legal Services Society (British Columbia)* (1995), 1995 CanLII 210 (BC SC), 10 C.C.E.L. (2d) 89 (B.C.S.C.). To the same effect is *Spencer Bower and Turner, The Law of Actionable Misrepresentation* (3rd ed. 1974), at p. 218:

A man who has told even an innocent untruth, by which he has induced another to alter his position, — much more one who has fraudulently lied with that object and result, — has debarred himself from ever complaining in a court of justice, any more than he could in a court of morals, that the representee acted on the faith of his misstatement in the manner in which he, the representor, intended that he should. He can never be heard to resent the fact that another believed the lie that was told for the very purpose of inspiring that belief, or plead as an excuse that, if the representee had not been such a fool as to trust such a knave, no harm would have been done.

[116] A different rationale was suggested by Slatter J. in *Wilson v Bobbie*, [2006] 8 WWR 80 (ABQB) at paragraph 20, where, after referring to *Performance Industries Ltd.*, he said in part:

[20] ...The fraud cases may however be seen as unique, because the essence of fraud is to trick the plaintiff into doing something foolish, and to allow a defence of contributory negligence would be inconsistent with the tort itself. The fraud cases do however show the problems of apportioning liability in cases of intentional torts: the exercise always amounts to suggesting the victim of an intentional act is responsible for his or her own damage, even though that damage was the result intended by the defendant.

[117] Slatter J. gave another contextual reason in the next paragraph, noting that historically it was no defence to an intentional tort that the plaintiff himself was a tortfeasor.

[118] He also suggested in paragraphs 26 to 29 that there are strong policy reasons for not allowing a person convicted of a criminal offence to shift the blame to the victim or third parties.

[119] In *Sloan v Black Sea Homes Corp*, 2007ABPC 231, Ingram P.C.J. suggested two other possible considerations. At paragraph 20, after concluding that currently it seems that any fault on the part of the plaintiff cannot be considered in an action based on fraud, he observed:

[20] ... This is an unfortunate anomaly which will no doubt some day be dealt with. The logical justification for refusing to consider division of fault between the fraudulent defendant and the negligent plaintiff would be that any fault on the part of the plaintiff severs causation between the defendant's conduct and the plaintiff's loss. Either the plaintiff was induced or he was not. This is the "black or white" approach which historically saw contributory negligence defeat negligence claims rather than result in an apportionment of liability based on comparative fault. This absolute approach is no longer necessary under the (mis-named?) *Contributory Negligence Act*, chapter C-27...

[120] After discussing the *Contributory Negligence Act*, as it pertained to apportioning fault, at paragraph 22 Ingram P.C.J. noted:

[22] Fraud has remained an exception only, I suggest, because of the moral opprobrium [sic] attached to the label. The consequences of fraud have remained draconian even though the concept of fraud has become "elastic" resulting in decisions in which the consequences of fraud have been treated as operative even in the absence of any positive conduct on the part of the defendant. The failure of a vendor to disclose a latent condition of property of which the vendor had knowledge which rendered the property uninhabitable has been considered by some courts (and was argued by the Plaintiff in this case, as an alternate basis of liability) to be actionable on the basis that it constitutes actionable concealment, e.g., *Biegler v. Stacey*, [1995] A.J. No. 488 (Alta. Prov. Ct.) Surely as against such misconduct on the part of a vendor, a failure to take precaution to prevent or minimize possible loss on the part of a purchaser should, it could be argued, have some effect.

[121] All those reasons for holding a defendant fully liable in the case of fraud clearly exist where the fraudster is the defendant. It makes no sense whatsoever, that a victim should not be entitled to recover damages for the full amount of his loss from the fraudster who perpetrated the loss.

[122] Similarly, those reasons for holding a defendant fully liable in the case of fraud clearly exist where the fraudster is the operating mind or has a significant beneficial interest in a defendant. In such cases, the defendant really is the alter ego of the fraudster. The most obvious example is where the fraudster is the sole owner or sole or controlling shareholder of the defendant and is using the defendant, usually a corporate entity, if not to assist in the fraud, but to hide behind it.

[123] Likewise, those reasons for holding a defendant fully liable in the case of fraud clearly exist where there is a fiduciary relationship between the victim and the defendant, in whatever capacity the fraudster may be associated with the defendant. Obvious examples include a bank employee defrauding the bank's customer, a lawyer's client being defrauded by the lawyer's employee, and an investment firm's customer being defrauded by its employee.

[124] But, do those reasons exist, where the fraudster has no connection with the defendant other than as an employee, and where the defendant is vicariously liable but has no direct or independent liability because of his own fault?

[125] It is important to note that *Performance Industries Ltd* was not a case of vicarious liability. Vicarious liability is not even mentioned in the reasons for decision. Nor would one expect it to be mentioned, since the fraudster was not merely the employee of the corporate defendant or an agent of the defendant, but at all times was its “directing mind”. (See paragraph 3.)

[126] The relationship between the fraudster, Terrance O’Connor, and the corporate defendant was described by the trial judge in *Sylvan Lake Golf & Tennis Club Ltd v Performance Industries Ltd*, 1999 ABQB 479, as follows at paragraph 119:

In argument counsel for the Defendants advanced the proposition that Terrance O’Connor personally should not be subjected to any judgment for damages, interest or costs as the party to the Agreement was at all times Performance Industries Ltd. a corporate entity separate and apart from Mr. O’Connor. That argument is rejected by this court in its entirety. It is clear from the evidence that that corporation was an entity wholly controlled by Mr. O’Connor and set up by Mr. O’Connor expressly for the purpose of holding his interest in the Sylvan Lake joint venture. All and every action undertaken with respect to the formation of the Agreement and its enforcement was directed by Mr. O’Connor and the contract was formed between he and Mr. Bell as individuals on the understanding that their separate interests in the joint venture would be placed in the names of their nominee corporations. Every action taken to defeat the legitimate interest of Bell and each attempt to deceive this court and deny justice to Bell was that of O’Connor. Surely there could never be a clearer case in which the court must pierce the corporate veil and attribute to O’Connor personally full responsibility for any and all of the acts undertaken in the name of Performance. The judgment herein pronounced shall be against both Defendants jointly and severally.

[127] The claim arose out of the plaintiff mistakenly believing the agreement of purchase and sale reflected a verbal agreement made between the parties with respect to development opportunities on the golf course. When the plaintiff proposed to develop the 18th hole into residential housing, the fraudster rejected the proposal relying upon a clause in the agreement that restricted development opportunities. The plaintiff brought an action for damages in lieu of rectification of the agreement on the ground of unilateral mistake. The victim of the fraud sought as against the corporate defendant rectification of the agreement or damages in lieu thereof.

[128] The issue of the plaintiff’s negligence arose in the context of the conditions precedent to granting an order of rectification. At paragraph 36 Binnie J. said the following:

[36] I referred earlier to the four conditions precedent, or “hurdles” that a plaintiff must overcome. To these the appellants wish to add a fifth. Rectification, they say, should not be available to a plaintiff who is negligent in reviewing the documentation of a commercial agreement. To the extent the appellants’ argument is that in such circumstances the Court may exercise its discretion to refuse the equitable remedy to such a plaintiff, I agree with them. To the extent they say the want of due diligence (or negligence) on the plaintiff’s part is an absolute bar, I think their proposition is inconsistent with principle and authority and should be rejected.

[129] That was rejected by the Court. At paragraph 66 Binnie J. concluded:

[66] I conclude, therefore that due diligence on the part of the plaintiff is not a condition precedent to rectification. However, it should be added at once that rectification is an equitable remedy and its award is in the discretion of the court. The conduct of the plaintiff is relevant to the exercise of that discretion. In a case where the court concludes that it would be unjust to impose on a defendant a liability that ought more properly to be attributed to the plaintiff's negligence, rectification may be denied. That was not the case here.

[130] In the next paragraph, Justice Binnie addressed the due diligence of the plaintiff and the fraud of O'Connor:

It should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected.

[131] In finding against the corporate defendant, which was the entity through which O'Connor operated, the corporate veil was lifted.

[132] Not only did Binnie J. not reference vicarious liability, he did not mention at all the *Contributory Negligence Act*.

[133] In my view, *Performance Industries Ltd* does not stand for the broad proposition that: a defendant who is without his own independent negligence but is found to be vicariously liable for the fraud of his employee, may not raise against the plaintiff the plaintiff's own negligence.

The Contributory Negligence Act

[134] Contributory negligence legislation was enacted to eliminate the absolute defence at law of contributory negligence on the part of a plaintiff. Even where the plaintiff's own negligence amounted to only one percent but the tortfeasor's negligence amounted to 99%, the plaintiff's claim in negligence was totally barred.

[135] The following are the relevant provisions of Alberta's current *Contributory Negligence Act*.

1(1) When by fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

(2) Nothing in this section operates to render a person liable for damage or loss to which the person's fault has not contributed.

2(1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.

(2) When 2 or more persons are found at fault, they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of a contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

3 In every action

- (a) the amount of damage or loss,
- (b) the fault, if any, and
- (c) the degrees of fault,

are questions of fact.

3.1 This Act applies if damage is caused or contributed to by the act or omission of a person, whether or not another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.

[136] The peculiar wording of the *Contributory Negligence Act* noted by Ingram P.C.J. in *Sloan*, as quoted above, was the subject of comment earlier in Alberta.

[137] In *Penner v Yorkton Continental Securities Inc.* (1996), 183 AR 5 (ABQB), Moore J., said at paragraph 102:

... The Alberta Statute is the Contributory Negligence Act, R.S.A. 1980, c. C-23. Perhaps the Statute should have a different name — the “Contributory Fault Act”. It is a two-page Statute, and the word “negligence” does not appear once (except in the title). On those two pages, the word “fault” appears twelve times. The phrase “act or omission” appears four times.

[138] While the *Contributory Negligence Act* has been amended since *Penner* by deleting two sections, the word “negligence” still appears only in the title and the word “fault” now appears ten times. The phrase “act or omission” continues to appear four times.

[139] The plaintiff contended that the word “fault” implicitly means “negligence” and nothing broader than that; and that in any event the *Contributory Negligence Act* cannot apply in any case as against a plaintiff where the plaintiff is the victim of a fraud.

[140] A frequently quoted case, and the only one provided to me which does not encompass the word “fraud” in the word “fault” when it comes to contributory negligence legislation, is the British Columbia Supreme Court decision in *United Services Funds v Richardson Greenshields of Canada Ltd* (1988), 22 BCLR (2d) 322 (BCSC). However, before discussing that case, it is important to note the earlier British Columbia Supreme Court case of *Anderson v Stevens*, [1981] 5 WWR 550 (BCSC), a decision of MacFarlane J. (as he then was), concerning the joint liability of and right of contribution amongst joint tortfeasors. After finding two defendants liable for fraudulent misrepresentation and two others liable in negligence for the plaintiff’s loss, Justice MacFarlane was asked to apportion liability as amongst the two tortfeasors. There was no finding of negligence on the part of the plaintiff. After reviewing a number of authorities in Canada, at paragraphs 22 to 25, His Lordship found the word “fault” under the British Columbia *Negligence Act*, was much broader than the tort of negligence:

[22] The Legislature in British Columbia has not seen fit to define the word “fault” in the *Negligence Act*, and I think it ought to be given its ordinary and natural meaning. It ought not to be treated as being synonymous with negligence. The Legislature has not treated it in that way in s. 5 of the statute, where it deals with the “fault or negligence” of a spouse.

[23] *Webster's New Collegiate Dictionary* defines fault, *inter alia*, as responsibility for wrongdoing and a person "at fault" as being "open to blame". *The Shorter Oxford English Dictionary* says "fault" can mean "to come short of a standard" or "to do or go wrong". "Faultful" is said to be synonymous with "culpable".

[24] The purpose of the legislation seems to have been to abrogate an unjust rule, and as Cheifetz, *Apportionment of Fault in Tort* (1981), says to provide "a restitutionary remedy — a remedy against the unjust enrichment of one tortfeasor at the expense of a co-tortfeasor". Resistance to the view that liability should be apportioned between all tortfeasors is based upon the proposition that an intentional tortfeasor ought not to have any right of redress. That concern, in my opinion, can be dealt with by apportioning the blame on the basis of relative or comparative culpability. What is important is that all those persons who have caused the damage or loss should share the liability in accordance with their respective degrees of fault. The legislation would not be sensible or just, and it would fail in its principal purpose if contribution was confined to those found guilty of negligence. In my opinion the Legislature ought not to be understood as having intended that a negligent person, being 10% at fault for the damage should be called upon to pay 100%, and to have no right of recourse against an intentional wrongdoer who had been 90% at fault.

[25] I hold that the word "fault" encompasses both intentional and negligent torts.

[141] There is very little difference in the wording between the *Negligence Act* of British Columbia at the time and Alberta's current *Contributory Negligence Act*.

[142] In *United Services Funds* the British Columbia Supreme Court ruled on issues in a stated case of a point of law before trial. At paragraphs 31 to 64, Southin J., as she then was, discussed the history of contributory negligence legislation. She pointed out that the purpose of the legislation was to alleviate the consequence described above at common law that where a plaintiff was contributorily negligent regarding the incident that caused his injury, he was barred from recovery, even though his negligence may have been less than that of the tortfeasor who also caused the injury. Southin J., rejecting the notion that there was any other purpose of contributory negligence legislation, concluded that it certainly did not create new duties at law (paragraph 36).

[143] As to the use of the word "fault" in contributory negligence statutes, Southin J., said this at paragraphs 54 to 56:

[54] The purpose in our Act of the word "fault", of which word so much was sought to be made by the defendants, was explained by McDonald J. (the Honourable David Alexander McDonald, who became Chief Justice of British Columbia on 5th January 1942) in the first reported case I have found in which the Act was applied, *Harper v. McLean*, 39 B.C.R. 426, [1928] 1 W.W.R. 444 at 446, [1928] 2 D.L.R. 220:

With the greatest respect to those learned Judges who have dealt with various phases of these statutes I suggest that in our Act the Legislature intended to do away with all the old difficulties which have been so long

the nightmare of Judges and juries and which arose from the use of the words “contributory negligence” and “ultimate” negligence. As a matter of fact, the word “negligence” is not used except in the title. The simple word “fault” is used, and I suggest that the intention was that a Judge or a jury in trying one of these cases should eliminate, as far as possible, the very difficult questions which formerly arose and apply the simple questions: By whose fault was the accident caused? by one of the parties alone? or by both parties and, if so, in what proportions?

[55] If one looks at the cases digested in vol. II of the B.C. Digest, one can discern that the concept of ultimate negligence was not to be so easily displaced from the judicial mind.

[56] If one accepts McDonald J.’s statement of the legislative purpose in British Columbia, as I do, one must infer that the word “fault” was not used with the purpose of making a profound change in all branches of the law.

[144] Justice MacFarlane’s earlier 1981 *Anderson* decision, which provided for a much wider view of the word “fault” than one limited to “negligence”, was not mentioned at all by Southin J. in *United Services Funds*. Surely it was not because Southin J. considered the meaning of the word “fault” as it pertained to the joint liability and the right of contribution amongst joint tortfeasors in one section of the *Negligence Act* was something different from the word as it pertained to the situation where the plaintiff was also at “fault”.

[145] The British Columbia Court of Appeal in *Brown v Cole*, [1996] 2 WWR 567 (BCCA), a defamation action, failed to reference Southin J.’s earlier comments in *United Services Funds* relating to the applicability of the section of the British Columbia *Negligence Act* concerning the joint liability and right of contribution amongst joint tortfeasors. The Court of Appeal followed *Anderson* and held that “fault” included intentional torts.

[146] Regardless of any concern about the persuasiveness of the *United Services Funds* conclusion as to the meaning of the word “fault”, the jurisprudence in Alberta interprets the word much more expansively.

[147] In *Penner*, Moore J. concluded that the breach of a fiduciary duty is a “fault” within the meaning of the *Contributory Negligence Act*.

[148] Two years earlier Mason J. apportioned liability between tortfeasors under the *Contributory Negligence Act* where one tortfeasor was found to have committed an intentional fraud and the others to have made negligent misrepresentations. See *Fletcher v Hand* (1994), 21 Alta LR (3d) 346 (ABQB).

[149] *Kelemen v El-Homeira*, 1999 ABCA 315 has been cited for the proposition that contributory negligence is not applicable in a deceit action. However, there is no reference by the Court of Appeal in that case to the existence of the *Contributory Negligence Act*.

[150] The facts of that case were that the defendant seller, who himself was a realtor, persuaded the plaintiff purchaser of real estate to seek the assistance and advice of a friend of the seller instead of the assistance and advice of another realtor because he did not want the other realtor involved. The defendant’s friend was also a realtor working in the same firm as the defendant. This relationship was not disclosed to the plaintiff. The property was vastly overvalued in the

defendant's representations to the plaintiff. The plaintiff relied on the representation and refrained from retaining the realtor he had initially intended to retain.

[151] The consequence of failing to obtain independent advice was that the plaintiff was persuaded, by the non-independent advice which was false, to make a decision from which he suffered a loss by entering into a contract to purchase the property for considerably more than it was worth and what had been represented to him by the defendant and his friend.

[152] The defendant suggested that since the plaintiff was not actively prevented from contacting his own expert, he was precluded from recovery. This suggestion raised the issue of contributory negligence, but it was summarily rejected at paragraph 26, without any reference to the *Contributory Negligence Act*, as follows:

[26] ... [T]he complete answer to the suggestion [the plaintiff] should, and could, have consulted [his own expert] is contained in the quotation from Salmond set out above. Put shortly, he did not have to do so, and a failure to do so, does not preclude his recovery. Further, contributory negligence is not applicable in the deceit action.

[153] As in *Performance Industries Ltd*, this was not a case of vicarious liability. Nor was vicarious liability discussed because it was the deceit of the defendant himself which caused the loss.

[154] The case of *Hartum v Sitko*, 2004 ABQB 854 involved an adjournment application, during which Lee J. referred to *United Services Funds*, as well as to the *Contributory Negligence Act*. However, his brief comments relating to both were *obiter* and moreover addressed the rights of apportionment and contribution between potential tortfeasors, not the plaintiff. (See paragraphs 22 to 30.)

[155] The aforementioned *Wilson* was a case where the plaintiff sued for damages for injuries he suffered in an assault. The defendant had been convicted in the ensuing criminal proceedings for assaulting the plaintiff. In an application to set aside a noting in default, the defendant raised as a defence provocation by the plaintiff because of an earlier assault upon the defendant by the plaintiff. Slatter J. denied the application, concluding that while the earlier assault was "fault" under the *Contributory Negligence Act*, that earlier assault did not cause the plaintiff's injuries. (See paragraph 32.)

[156] Slatter J. made a number of other comments about the *Contributory Negligence Act* in addition to the ones quoted above. At paragraphs 19 and 20 he said:

[19] The *Contributory Negligence Act* was enacted to reverse the common law rule that a plaintiff who sued in negligence, but was himself contributorily negligent to even the slightest degree, could not recover anything. The common law did not apportion liability. While the Act was directed to this specific problem, the Act does not mention "negligence" except in the title, and uses the word "fault" instead. The law on the scope of the word "fault" is unclear. Interpreted literally, it could cover any legal or moral delict. It has been held to include breach of fiduciary duty (*Penner v. Yorkton Continental Securities Inc.* (1996), 183 A.R. 5 (Alta. Q.B.)), breach of contract (*Finance American Realty Ltd. v. Speed* (1979), 38 N.S.R. (2d) 374, 12 C.C.L.T. 4 (N.S. C.A.)), and

intentional torts like trespass (*Bell Canada v. Cope (Sarnia) Ltd.* (1980), 11 C.C.L.T. 170 (Ont. H.C.) aff'd (1981), 31 O.R. (2d) 571 (Ont. C.A.)).

[20] The Court of Appeal has however held that there can be no contributory negligence in deceit: *Kelemen v. El-Homeira*, 1999 ABCA 315, 73 Alta. L.R. (3d) 399, 250 A.R. 67 (Alta. C.A.). It is no defence that the plaintiff foolishly believed the lies told by the defendant. Likewise in *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd* (1998), 22 B.C.L.R. (2d) 322 (B.C. S.C.) it was held that negligence by the plaintiff is not a defence to fraud. The Court rejected a wide definition of "fault".

[157] The Court limited the meaning of "fault" strictly to the situations at law where a plaintiff would be precluded from recovering because of contributory negligence. The result, if not the reasoning, was approved in *Sylvan Lake Golf & Tennis Club Ltd v Performance Industries Ltd*, 2002 SCC 19, [2002] 1 SCR 678. The fraud cases may however be seen as unique, because the essence of fraud is to trick the plaintiff into doing something foolish, and to allow a defence of contributory negligence would be inconsistent with the tort itself. The fraud cases do however show the problems of apportioning liability in cases of intentional torts: the exercise always amounts to suggesting the victim of an intentional act is responsible for his or her own damage, even though that damage was the result intended by the defendant.

[158] The decision *Fletcher v Hand* was referred to by Ingram P.C.J. in *Sloan* while discussing the interpretation of the word "fault" in section 1(1) of the *Contributory Negligence Act*. After referring to the conflicting opinions in the two British Columbia cases of *Anderson* and *United Services Funds*, Ingram P.C.J. made the following comment:

[21] ... There does not appear to be any reason that contributory fault may not be considered in the case of intentional torts. Mason, J., in *Fletcher v. Hand* (1994), 21 Alta. L.R. (3d) 346 (Alta. Q.B.), Acton, J., in *S. (C.) (Next Friend of) v. Miller* (2003), 2004 ABQB 137 (Alta. Q.B.), and Watson, J., in *Raywalt Construction Co. v. Bencic*, 2005 ABQB 989 (Alta. Q.B.) each apportioned fault between defendants whose wrong was intentional and others whose fault contributed to the plaintiff's loss. In principle, it is arguable that where the plaintiff's contributory fault has contributed to the plaintiff's loss, the plaintiff should bear part of the loss even where the defendant's fault was intentional. The pre-condition to apportionment under the Act is that the fault of each be an operative cause of the plaintiff's loss. *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.) Once causation is determined, the apportionment is based on the comparative blameworthiness of the conduct of each person whose fault contributed to the loss. *Heller v. Martens* (2002), 303 A.R. 84 (Alta. C.A.).

[159] It is clear from the facts that this was not strictly a case of vicarious liability on the part of the corporate defendant. As in *Performance Industries Ltd*, the fraudulent conduct was that of the principal, or operating mind or alter ego of the defendant. It would be unconscionable not to attach the fraudster's liability to the alter ego used to further the fraud or benefit from it.

[160] Importantly, there was no *obiter* discussion by Ingram P.C.J. as to the applicability of the *Contributory Negligent Act* to cases where there was vicarious liability on the part of the defendant without any direct or independent liability of the defendant.

[161] The Alberta Court of Appeal referred to the word “fault” in the *Contributory Negligence Act* in *S. MacLise Enterprises Inc v Union Securities Ltd*, 2009 ABCA 424. In this decision the plaintiff was found contributorily negligent where the defendants had made negligent misrepresentations, the employer defendant having been found to be vicariously and directly negligent as well. However, the Court did not discuss the ambit of the meaning of the word “fault. It added this brief comment at paragraph 40:

[40] There is no finding of fraud on this record that would preclude the operation of the principles of contributory negligence within the rule in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 (S.C.C.) at paras. 68-70.

[162] The preceding cases in my view muddy any conclusion on the issue of whether the word “fault” in the *Contributory Negligence Act* includes a fraud when it comes to apportioning liability between a defrauded victim and the fraudulent tortfeasor.

[163] With the exception of *United Services Funds*, which appears to have been subsequently discredited, in the result at least by the British Columbia Court of Appeal, those cases which specifically speak to the issue, and there are only some which do, take an expansive approach to the meaning of the word “fault”. “Fault” has been held to apply to intentional and negligent torts.

[164] In those cases specifically addressing the issue, brief as that address was in the Alberta Court of Appeal decision in *S. MacLise Enterprises Inc*, what was said was *obiter*.

[165] Further, in all of the cases other than *United Services Funds*, the fraudster was the defendant, the operating mind or alter ego of the defendant, had a significant beneficial interest in the defendant or there was a fiduciary relationship between the plaintiff victim and the defendant.

[166] Both Slatter J. in *Wilson* at paragraphs 20 and 21, and Ingram P.C.J. in *Sloan* at paragraphs 19 to 22, conclude that fraud may be an exception to the applicability of the *Contributory Negligence Act*, for the reasons discussed above relating to principles and policy. Both come to that conclusion relying on the Supreme Court of Canada decision in *Performance Industries Ltd*, notwithstanding the fact that the latter case does not even mention the *Contributory Negligence Act*. If there was any doubt about that in *Sloan*, that doubt was eliminated by what Ingram P.C.J. said in his later decision in *1079681 Alberta Ltd v Iversen*, 2012 ABPC 316. (See paragraphs 36 and 37.)

[167] I conclude that the word “fault” in the *Contributory Negligence Act* must be given its broad and ordinary meaning, that it means more than merely negligence. Not only does this interpretation give effect to the plain meaning of the word, this is how it has generally been interpreted.

[168] Moreover, if a narrower meaning was intended, the Legislature has chosen not to change the word “fault” to “negligence” in the body of the statute. It has changed the content of the *Contributory Negligence Act* in other respects with full knowledge that judicial authority in Alberta has given the word a wide meaning, a meaning encompassing intentional as well as negligent acts, and has chosen to continue to use the word “fault” and not “negligence”.

[169] For the same reasons I conclude that the word “fault” includes both tortious acts and breaches of contract.

[170] I accept, not only because I must since I am bound by precedent, but also by reason that it only makes sense for the reasons discussed, that there must be an exception in the case of fraud in those instances where, as I have noted:

- the defendant fraudster was the defendant,
- the fraudster was the operating mind or alter ego of the defendant,
- the fraudster had a significant beneficial interest in the defendant, or
- there was a fiduciary relationship between the plaintiff victim and the defendant.

Vicarious Liability, Fraud and the Contributory Negligence Act

[171] Only one authority speaks to the question of whether, in vicarious liability cases, where the defendant is not also independently or directly liable, either the plaintiff's "negligence" or the "fraud" should not be considered as "fault" within the meaning of the *Contributory Negligence Act*.

[172] That authority is consistent with or follows *United Services Funds* decision, which as noted above has been discredited as to its view of the meaning of the word "fault".

[173] In *United Services Funds* Southin J. addressed specifically this issue at paragraph 76 in these words:

[76] The issue before me may be put thus: if B is the customer of A and if the servant of A and the servant of B enter into a fraudulent scheme to defraud B through the instrumentality of A's business, neither A nor B being aware of the fraudulent scheme, and both believing that the transactions were honest transactions in accordance with the authority of their respective servants, can B recover all the loss from those transactions? ...

[174] After a lengthy discussion on the relationships giving rise to vicarious liability, Justice Southin said the following at paragraphs 80 to 83:

[80] If the foundation of the doctrine is that the tort of the servant is the tort of the master, then it would appear to follow logically that the master can raise no defence which the servant could not raise.

[81] But if the foundation of liability is something else, then a serious difficulty arises, particularly in the case of a tort which requires for its commission, as does fraud, evil intent. What is before me now is an allegation of a tort committed by the servant but where the master is not proven to have had an evil intent.

[82] It is curious how little authority there is which assists in the resolution of this issue.

[83] I am satisfied that the judgment of the English Court of Appeal in *Armagas Ltd. v. Mundogas S.A.*, [1985] 3 W.L.R. 640, [1985] 3 All E.R. 795, affirmed without dealing with this point [1986] 2 All E.R. 385 (H.L.), provides an answer, although it may not be an answer which appeals to everyone.

[175] That 1986 English House of Lords decision, itself depended upon a decision of the Supreme Court of Canada in 1917, *Barry v Stoney Point Canning Co*, (1917) 55 SCR 51 (SCC), a case from Ontario. Those were the only two decisions relied upon by Southin J. Nevertheless, she concluded that in the case of fraud the defendant whose sole liability vis-à-vis the plaintiff victim was vicarious, could not raise as a defence the *Contributory Negligence Act*. I note that *Barry* was decided before there was contributory negligence legislation in Ontario. That timing distinction was not addressed by Southin J.

[176] I disagree with the reasoning in *United Services Funds*.

[177] I note the difficulty Southin J. had in finding authority on the point. I regret that I am unable to do better than her in locating meaningful judicial precedent on this issue.

[178] Ingram P.C.J. in *Sloan* noted the irony of a “black or white” approach to interpreting the *Contributory Negligence Act*, when that very Act was enacted at least at that time in part to remedy a “black or white” approach to contributory negligence. He suggested that such an absolute approach was no longer necessary because of the *Contributory Negligence Act*.

[179] The facts before Ingram P.C.J. differ from the facts before me. The fraudster was the alter ego of the defendant. It would seem that he considered himself constrained on those facts, where the defendant was the fraudster or the alter ego of the fraudster, to even enter into an analysis as to whether the plaintiff was contributorily negligent.

[180] It is also important to consider whether policy and the reasons justifying making fraud an exception to the application of the *Contributory Negligence Act* apply in all cases of vicarious liability.

[181] The reasons for an exception only exist where the fraudster is the defendant, or is the operating mind or alter ego of the defendant, or the defendant obtains a benefit from the fraud, or the defendant is in a fiduciary relationship with the victim or the defendant is independently or directly liable for its own conduct.

[182] When none of those factors are present, fairness and equity suggest there is no justification for preventing the vicariously liable defendant to obtain some measure of relief from the full responsibility of the loss to which the plaintiff has contributed.

[183] In this case, the defendant is not directly or independently liable, it was not the alter ego of the fraudster, it gained nothing from the fraud. There was no fiduciary relationship between the plaintiff and the defendant.

Apportionment

[184] Apportionment under the *Contributory Negligence Act* is based upon the comparative blameworthiness of the conduct of those whose fault contributed to the loss, once the loss or damage is found to be the concurrent fault of both parties. (See *Heller v Martens* (2002), 303 AR 84 (ABCA)). While that case involved negligence on the part of both the plaintiff and the defendant, if the meaning of the word “fault” is broader than “negligence”, it follows that it applies to fault arising out of any tort or breach of contract.

[185] Once causation is determined, the apportionment is based on the comparative blameworthiness of the conduct of each person whose fault contributed to the loss.

[186] At paragraph 34 the Court of Appeal in *Heller* listed five non-exhaustive factors to consider in weighing fault as distinct from weighing causation. They are:

1. the nature of the duty owed by the tortfeasor to the injured person,
2. the number of acts of fault or negligence committed by a person at fault,
3. the timing of the various acts,
4. the nature of the conduct held to amount to fault, and
5. the extent to which the conduct breaches statutory requirements.

[187] At paragraph 35, the Court, dealing as it was, with a situation where the defendant was negligent and the plaintiff was contributorily negligent, observed that:

... [F]ault may vary from extremely careless conduct, by which a party shows a reckless indifference or disregard for the safety of persons or property, to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm. Degrees of contributory negligence are assessed accordingly.

[188] In a situation where comparative blameworthiness is assessed by weighing the fault of an intentional act against the fault of a negligent act, it only makes sense that normally the intentional act should weigh more. *A fortiori* that makes sense where the intentional act is a fraudulent act and the negligent act is that of the victim of the fraud, even in those cases where the defendant is vicariously liable for the fraud, and yet has no direct or independent liability. In those cases, it seems to me that excepting unusual circumstances, the fourth factor suggested in *Heller*, “the nature of the conduct held to amount to fault” should weigh considerably more than the others.

[189] In the circumstances of this case, I attach 15% of the blameworthiness to the plaintiff himself. The defendant is attached with 85% of the blameworthiness.

Damages

[190] The plaintiff asks for the return of the money he paid the fraudster, the \$25,000 down payment or deposit together with the 13 monthly payments of \$650 per month which he paid before the truck was seized, a total of \$33,450.

[191] He suggests that is the proper measure of his damages.

[192] The same reasoning would however lead to an absurd result, as illustrated by this scenario. Had the purchase price been \$48,000, had he paid nothing down, had he been obliged to pay \$1,000 per month with no interest being charged, then the truck would have been paid for in its entirety after 48 months. Had the vehicle been seized after the 47th payment but before the 48th payment was made, the plaintiff’s reasoning would be that he was entitled to the return of \$47,000. In that case he would have had the use of the vehicle for a term of four years at a total cost of \$1,000, being the 48th or last payment. This makes no sense at all.

[193] It ignores the principles of betterment – that while a successful plaintiff should be no worse off were it not for what the defendant has done, neither should he be better off.

[194] If that reasoning were adopted, the law would be party to facilitating an unjust enrichment. That cannot be.

[195] In my view the proper measure of the plaintiff's damages is to determine the value of the truck at the time it was seized, less the amount still owing on it under the financing arrangement the plaintiff understood he had entered into.

[196] That approach would be consistent with the observations of Viscount Haldane L.C., in *British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London, Limited*, [1912] AC 673, at pages 688-9.

[197] The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity.

[198] Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.

[199] The amount still owing is easily calculated. The purchase price was \$50,758.38. That is what the plaintiff expected to pay. What he did pay was \$33,450. What he still expected to pay upon being made aware of the breach of contract and fraud was an additional \$17,308.

[200] Much more difficult to determine is the value of the plaintiff's truck at the time of the seizure. I would have expected some evidence of that from one or both of the parties, but there was not a whit of it – notwithstanding that the onus of proof is on the plaintiff and notwithstanding that surely the defendant was in a position to adduce some evidence of at least a range of values, having regard to the fact that it was in the automotive industry as a dealer.

[201] I say some evidence, and I refer to a range, because the defendant would not of course be expected to be aware of how some of the variables would play out in appraising this particular truck at that precise moment in time. Those variables would include the condition of the truck, including mileage and vehicle damage, as well as the existing market for this particular truck's make, model and features.

[202] An appraised value would take into account depreciation, which I expect would be subsumed in a consideration of the market value for that particular truck's make, model and features.

[203] The defendant argued that the plaintiff's damages ought to be reduced for depreciation, noting that it was a new truck and suggesting a depreciation rate of about 28% over the first year alone.

[204] The plaintiff argued that since there was no evidence of depreciation, let alone its rate, the Court could neither take it into account nor take judicial notice of it.

[205] However, that may be, both parties were in a position to call evidence as to the fact and the rate of depreciation. Neither did.

[206] I am of the view that I can take judicial notice of depreciation and further that it is neither linear nor progressive, but rather regressive, with the greatest rate in the first year and the next greatest rate in the second year and so on.

[207] Even if there were some evidence as to the appropriate rate of depreciation, that leaves the question as to what base is to be used to depreciate from? Is it the manufacturer's suggested retail price, or is it the price which the plaintiff paid, or is it some price in between? I have already noted the fact that in this particular case, had there not been a straw purchase, the price would have been greater than what the plaintiff actually paid, but it may well have been less than the manufacturer's suggested retail price because of any number of the factors I have already discussed in the setting of a price, including the availability at that time of manufacturer's rebates.

[208] Should the base take into account the taxes and other fixed charges paid by the plaintiff that are part of the purchase price? The plaintiff did pay them, but on the other hand they are transactional charges only. They would not have anything to do intrinsically with the value of the vehicle at the time of sale, but they may well play a part in the mind of a buyer and even in the mind of the seller if the seller wanted the sale badly enough.

[209] All of which leaves me with very little confidence that I will be able to determine with any degree of correctness what the value of the plaintiff's truck was at the time of seizure, some 16 months after the sale.

[210] The comments of Viscount Haldane L.C., in *British Westinghouse Electric and Manufacturing Company Limited* quoted above were referred to in *Penvidic Contracting Co v International Nickel Co of Canada*, [1976] 1 SCR 267 (SCC), where Spence J. addressed the difficulty in fixing the amount of damages.

[211] At paragraph 23 Spence J. followed comments in an earlier Supreme Court of Canada decision, *Wood v Grand Valley Railway Company*, 51 SCR 283 (SCC), where Davies J. said at p. 289:

It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.

[212] My best estimate as to the value of the plaintiff's truck at the time it was seized, having regard to all of the vagaries, uncertainties and variables I have described, is \$37,500.

[213] I am satisfied that such value would be the same value whether determined as the actual cash value or the replacement value.

[214] I conclude that the plaintiff's damages are that amount less \$17,308, for a total of \$20,192.

Conclusion

[215] The plaintiff shall have judgment against the defendant for 85% of the assessed damages of \$20,192, for a net amount of \$17,163.20, together with interest under the *Judgment Interest Act*, RSA 2000, c J-1 from November 8, 2014.

[216] If the parties are unable to agree upon costs, they may contact the Clerk of the Court to set a date when I will hear submissions concerning same.

Heard on the 6th day of June, 2017.

Dated at Sherwood Park, Alberta this 19th day of January, 2018.

J. Maher
A Judge of the Provincial Court of Alberta

Appearances:

Timothy M. Sax
for the Plaintiff

David M. Stults
for the Defendant

TAB 13

Court of Queen's Bench of Alberta

Citation: Kowal v Sun Star Energy Inc, 2020 ABQB 244

Date: 20200408
Docket: 1301 05604
Registry: Calgary

Between:

Raymond David Kowal, Janet Irene Kowal, Eagle Tree Investments Corporation, Otto David Cutts, Lois M. Cutts, Neil Gordon Devitt, Donald S. Devitt, Kevin Orriss, Marc Clement, Terry Lynn Clement, Lerry Hubbs, Robert Knoll and Mei Choon Knoll

Plaintiffs

- and -

Sun Star Energy Inc., Robert McCormick, Sandy Rizopoulos and Lester Hartland

Defendants

**Reasons for Decision
of
Honourable Madam Justice A. Woolley**

Introduction

[1] In 2011 Lester Hartland, Robert McCormick and Sandy Rizopoulos marketed and sold shares in a company they had created, Sun Star Energy Inc. ("Sun Star").

[2] The Plaintiffs claim that the marketing and sale of those shares was based on false information. They say that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos knew that the information was false. They say that they relied on it, and that as a result they suffered a loss. They say, in short, that this is a case of fraudulent misrepresentation and the Defendants should give them their money back.

[3] With the exception of Mr. Kevin Orriss, who has terminal cancer and was unable to testify, I accept the Plaintiffs' claims.

[4] The evidence before me shows that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos came up with a scheme to market the shares in Sun Star without concern for the truth of the

claims that they made; indeed, the evidence shows that they marketed the shares based on false information about their own financial investment, the shares they held and, by providing false information about an important analogue well, the quality of the assets Sun Star had acquired.

[5] Sun Star itself was not a scam. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos legitimately hoped that the company would be profitable, and that they and all of their investors would be enriched by its ventures. They had acquired assets to develop, and they took steps to develop those assets.

[6] But the assets Sun Star owned, and the opportunity it offered, were modest, and required patience and time to attract investors and achieve success. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos were unwilling or unable to exercise patience and take the necessary time, and instead sought investors quickly, presenting Sun Star as a much better opportunity than the true information showed it to be. And in doing so they committed a civil fraud on the Plaintiffs.

[7] The Plaintiffs also make claims against the Defendants based in oppression, breach of fiduciary duty and piercing the corporate veil. Given my findings on the Plaintiffs' action in civil fraud, I do not consider these other claims.

Issues

[8] The issues in this trial are as follows:

1. Are the Defendants liable to the Plaintiffs for fraudulent misrepresentation? In particular:
 - a) Did the Defendants knowingly or recklessly make false representations to the Plaintiffs on which those Plaintiffs relied and as a result of which they suffered a loss?
 - b) How, if at all, is this Court's assessment of the Defendants' liability constrained by limits in the allegations contained in the Plaintiffs' Amended Amended Amended Statement of Claim?
 - c) Can the Defendants avoid liability based on the Plaintiffs' lack of due diligence or because the falsity of the Defendants' representations was easily discoverable?
 - d) Can a Defendant avoid liability to a Plaintiff if a false representation was made only by another Defendant or Defendants?
 - e) Do the Subscription Agreements signed by the Plaintiffs affect the Defendants' liability?

Background Facts

Founding Sun Star Energy – May 2009 to June 2011

[9] In 2009 Mr. Jim Gotmy introduced Mr. Hartland and Mr. McCormick to Mr. Rizopoulos. They began working together to pursue opportunities in the oil and gas sector. Mr. Hartland and Mr. McCormick had experience in bringing in financing to start and develop projects, but only in the real estate sector. Mr. Rizopoulos, a petroleum engineer with many years of oil and gas experience, brought the oil and gas expertise.

[10] On May 8, 2009 Mr. Hartland, Mr. McCormick and Mr. Rizopoulos incorporated the numbered company that later became Sun Star. The business plan was for Sun Star to pursue a low risk good reward development projects, and then to use the income from those projects as a springboard from which to pursue higher risk but potentially much higher reward exploration projects. The low risk projects they pursued were ones in developed areas, with land and pipeline access and with known reserves, so that the capital costs would be low and the likelihood of a commercially viable well relatively high.

[11] From 2009 until the first issuing of common shares to outside investors in July 2011, none of Mr. Hartland, Mr. McCormick or Mr. Rizopoulos received any payment for the work they did to establish Sun Star, although they all testified that they worked hard and put in many hours to establish the company and create opportunities for it to pursue. Mr. Hartland and Mr. McCormick's real estate development company, Condo-Condo Holdings Inc. ("Condo-Condo"), lent money to Sun Star in order for it to acquire oil and gas interests, as discussed below.

[12] In return for these contributions, and in reflection of their efforts, Mr. Hartland, Mr. McCormick and Mr. Rizopoulos named themselves officers and directors of Sun Star. Mr. Hartland was the President, Mr. McCormick was the Secretary, Treasurer and Chief Financial Officer, and Mr. Rizopoulos was the Chief Operating Officer.

[13] Mr. Hartland, Mr. McCormick and Mr. Rizopoulos also issued themselves shares in the company. They issued themselves a few hundred shares from 2009 to 2011, along with some other initial investors. In early 2011 they bought out the other initial investors and restructured their own investment in Sun Star. Specifically, as of March 31, 2011 Condo-Condo was issued 4,866,700 shares. Mr. Rizopoulos's consulting company, Hyperion Oil and Gas Inc. ("Hyperion"), was issued 2,433,300 shares. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos were each issued an additional 900,000 shares. As a result, the total shares issued in the company were just over 10,000,000, of which each founder controlled about 1/3.

[14] Mr. McCormick said that the 10,000,000 shares issued as of March 31, 2011 were based on a "stock split" and an estimate that at that time Sun Star had assets worth \$10,000,000, such that it was legitimate to split their initial 1000 shares on a 10,000 to 1 basis.

[15] The estimate of Sun Star's worth was not based on a third-party independent appraisal of the assets. Nor was it supported by any documentation provided to me. Mr. McCormick described it as a valuation based on information from Mr. Rizopoulos, Mr. Roger Hume (who advised Sun Star on its oil and gas activities) and Sun Star's legal counsel Mr. Scott Reeves. In cross-examination Mr. McCormick clarified that they had not in fact put a value on the assets prior to doing the stock split – they had had discussions about the assets but had not valued them *per se*. Nonetheless, it was the worth of the company in the eyes of the Defendants which, they say, justified their decision to issue themselves 10,000,000 shares at no cost.

[16] Specifically, the stock split appears to have been based on the Defendants' hope that the properties they had acquired within the last two years for a total financial output of \$190,000, including what they paid for seismic, would prove to be so oil rich, easily developed and highly profitable that – even prior to any of that having been proven to be the case – they could be estimated to be worth \$10,000,000. Moreover, the Defendants thought this estimate of Sun Star's assets sufficiently legitimate to justify issuing themselves 10,000,000 Sun Star shares prior to selling shares to third parties.

[17] The financial statements of Sun Star as of September 30, 2011 do not match this estimate of asset value. They list the capital assets of Sun Star as worth \$531,755. As of September 30, 2012, the financial statements list the capital assets as worth \$2,911,079.

[18] While the record before me suggests that the Defendants' stated view of their assets in March 31, 2011 was not justified by what they knew at that time, I do note that they were represented by Mr. Reeves who, according to Mr. Hartland and Mr. McCormick, accepted the issuance of the shares on this basis and prepared the necessary legal documentation to do so. I also acknowledge that effective December 31, 2011 they obtained a report from Sproule and Associates that assessed the proved plus probable reserves of the company at a 10% discount rate at \$10,682,000.

Oil and Gas Interests Acquired: May 2009 - June 2011

[19] To pursue its corporate objectives, Sun Star sought out projects with a mix of risk profiles. Prior to July 2011 it managed to obtain a small number of oil and gas development and exploration interests to pursue, some of which it identified as low risk, and some as high risk.

[20] The most immediately significant of these was an interest obtained from Tiger Moth Energy Inc. ("Tiger Moth") in the Charlie Lakes pool in eastern Alberta. Sun Star farmed-in to a five-year petroleum and natural gas lease owned by Tiger Moth, which gave Sun Star the right to drill at the 13-29-68-6 location (the "13-29" or "Elmworth" opportunity and well). To obtain the 13-29 opportunity from Tiger Moth, Sun Star paid Tiger Moth \$40,000 and granted to it a 7 ½ percent gross overriding royalty. They also granted a 1.5% gross overriding royalty to Mr. Roger Hume, an oil and gas expert who had consulted with the Defendants.

[21] To support drilling at the 13-29 location, Tiger Moth provided data about two analogue wells in particular. One, the 10-30 well, had produced at a modest rate but over time had produced a high amount of total oil reserves, about 750,000 barrels. The 10-30 well was one of several wells west of the 13-29 opportunity that had been on production for a number of years. The other analogue well, the 4-32 well, had produced only for a short period of time but, in its first few days of production, had produced at a high rate of 433 barrels of oil per day ("bbls/d").

[22] Mr. McCormick testified that the more significant information in deciding to acquire the 13-29 opportunity related to the 10-30 and other wells to the west, and the total reserves that had been produced from those wells. It was those wells, Mr. McCormick said, which supported the decision to acquire the 13-29 well, not the 4-32 well – he said that in discussions with Tiger Moth the 4-32 well was not the main topic of discussion, and that it was not the focal point. He questioned whether the 13-29 well was even in the same pool as the 4-32 well.

[23] In his testimony Mr. Rizopoulos agreed that the wells to the west were important but emphasized the importance of the 4-32 well as an analogue that could be used to assess the 13-29 well. He said that it was the initial production from the 4-32 well that Tiger Moth was excited about and that Sun Star was excited about. The 4-32 well was very close to the 13-29 location, approximately 200 metres away, and the 13-29 well was intended to be a "twin" of the 4-32 well. Mr. Rizopoulos emphasized the 4-32 well's geological features – and in particular a 30% porosity streak – that suggested the 13-29 well would be productive.

[24] Mr. Hartland also noted in his evidence the significance of the 4-32 well. He said that the only production graph he had any familiarity with was the one related to the 4-32 well. He also said that they thought that the 4-32 well might be connected to the same pool as the wells to the

west. He noted that he thought the 4-32 well might have been shut in in order to prevent draining of the wells to the west.

[25] On this point I prefer the evidence of Mr. Rizopoulos and Mr. Hartland to Mr. McCormick. I note that the information presented to investors highlighted the 4-32 well, featuring it on 3 of the slides about the 13-29 opportunity, and putting a bold and highlighted banner about the production from that well on two of those slides. The Defendants provided more information about the 4-32 well to investors than they did about the 10-30 well or the other wells to the west of the 13-29.

[26] In addition, Mr. Rizopoulos was the oil and gas expert at Sun Star, and the person with the primary role in identifying and evaluating oil and gas opportunities. He is the person best positioned to accurately identify what Sun Star used and relied on to evaluate the 13-29 opportunity. Other evidence presented in the trial showed that all of the parties, including Mr. McCormick, had a consistent interest in the 4-32 well. As Mr. Hartland's evidence suggested, they did not see the 4-32 well as necessarily separate and distinct from the wells to the west.

[27] Mr. McCormick himself later testified that once the 13-29 well came close to production the parties expected the 4-32 well to be opened again and watched it with interest because of the close relationship between it and the 13-29 well. This casts doubt on the accuracy of Mr. McCormick's earlier testimony that the 4-32 well was not the focus or important in the decision to pursue the 13-29 opportunity.

[28] This is not to say that the wells to the west of the 13-29 were irrelevant or unimportant, but simply to emphasize the importance of the 4-32 well to the Defendants' decision to acquire the 13-29 opportunity.

[29] Mr. Rizopoulos received specific information about the 4-32 well from Mr. Duncan McCowan of Tiger Moth on May 2, 2011, which he forwarded to Mr. Hartland and Mr. McCormick. Specifically, he was given production data that said:

1. In December 2008 the 4-32 well produced daily of 433.2 bbls/d and had cumulative production of 974.8 barrels.
2. In January 2009 the 4-32 well produced 112 bbls/d and had cumulative production of 2318.3 barrels.
3. In February 2009 the 4-32 well produced 59.6 bbls/d and had cumulative production of 3620.3 barrels.
4. The "Life Summary" of the 4-32 well was 100.3 bbls/d with cumulative production of 3620.3 barrels.

[30] What that production data told Mr. Hartland, Mr. McCormick and Mr. Rizopoulos was that the 4-32 well came on production in December 2008. In December 2008 it produced oil for just over two days at an average rate of 433.2 bbls/day to generate a total amount of 974.8 barrels of oil in that month. It produced oil until February 2009. Over that three-month period the 4-32 well produced an average of 100.3 bbls/d at a declining rate, with the last days of production being about one seventh of the production in the first two and a half days. As of May 2011, the 4-32 well had not produced any oil since February 2009, when it was shut in.

[31] Mr. Rizopoulos also testified that Tiger Moth advised him that they had a scout who witnessed trucks shipping oil from the 4-32 well to market. He confirmed in his testimony that this was something he was told prior to July 2011.

[32] One question relevant to this litigation is: what was the “initial production” of the 4-32 well? Mr. Hartland, Mr. McCormick and Mr. Rizopoulos agreed that initial production means the initial production of a well over a defined initial production period. They disagreed, however, about how to define an “initial production period”.

[33] Mr. Rizopoulos said that, in his experience, the industry defines an initial production period as anywhere from 30 to 90 days. Mr. McCormick maintained that he understood the initial production period to be 24 hours. Mr. Hartland agreed with Mr. McCormick.

[34] I am not assessing here the Defendants’ evidence that their statements to the Plaintiffs only related to the “initial production” of the 4-32 well. Nor am I assessing the truthfulness and accuracy of their explanations about why they described the 4-32 well as they say that they did. I am considering only their evidence about how many days of a well’s production they would have included had they been trying to accurately communicate the well’s “initial production”.

[35] On that question I again prefer the evidence of Mr. Rizopoulos. Mr. Rizopoulos is an engineer with extensive oil and gas experience. Mr. Hartland and Mr. McCormick are not. Mr. McCormick said, in fact, that his knowledge of oil and gas came largely from Mr. Rizopoulos, as well as from meetings he had with Tiger Moth. Mr. Hartland said that he did not have any technical oil and gas knowledge. Amongst Sun Star’s Officers and Directors, Mr. Rizopoulos was the engineer and responsible for identifying appropriate oil and gas opportunities and evaluating their merits. In 2011, had the Defendants wanted to describe the initial production of the 4-32 well, they would have taken direction from Mr. Rizopoulos and identified the 4-32 well’s initial production from its production over its first 30-90 days.

[36] Given that, what was the “initial production” from the 4-32 well?

[37] The data available to Mr. Hartland, Mr. McCormick and Mr. Rizopoulos on May 4, 2011 showed that the 4-32 well produced 433 bbls/d for approximately 2 ½ days, 112 bbls/d for approximately 12 days and 59 bbls/d for just under 22 days. The number of days can be calculated by dividing the total cumulative oil produced in the month by the number of barrels of oil produced by per day. Using a weighted average of the May 4, 2011 production data, and a 30-day initial production period, the initial production of the 4-32 well was in the range of 110 bbls/day.

[38] The Defendants’ confidence that the 13-29 opportunity was low risk grew after Sun Star reached a farm-out agreement with Western Canadian Oil and Gas Inc (“Western”). Under that agreement, Western would drill the well and, after it had recovered its costs, would share the profits with Sun Star on a 50/50 basis. That meant that Sun Star could profit from the 13-29 well if it proved successful but would take none of the risks arising from drilling it.

[39] In addition to the 13-29 opportunity, Sun Star also acquired an opportunity to drill between one and four wells in a pool in southern Alberta, called Nisku. Mr. Rizopoulos had prior experience in that area on which Mr. Hartland, Mr. McCormick and Mr. Rizopoulos hoped to capitalize. In addition, Sun Star entered into a farm-out agreement with Galleon Energy (“Galleon”) on Section 21, allowing Galleon to farm-in and granting Sun Star a royalty. The Defendants viewed the Nisku and Section 21 opportunities as low risk.

[40] Finally, Sun Star acquired a large parcel of land, just over 12 sections, from the Crown for \$113,000, called Montney. The Montney land was the main higher risk opportunity acquired by Sun Star, which the Defendants hoped would generate high rewards.

[41] All of the Defendants emphasized the importance of the Montney opportunity to Sun Star's long-term success and viability. Mr. McCormick testified that, after they acquired the Montney opportunity, Shell Oil acquired interests in the land all around theirs, and at a much higher price. This both increased the immediate market value of the Montney interest and gave the Defendants confidence that the oil they hoped to find would be there.

[42] I accept that Montney was important to Sun Star. As Mr. Rizopoulos explained, however (and on this he was not contradicted), the overall business plan of Sun Star depended on first achieving cash flow through the lower risk 13-29, Nisku and Section 21 opportunities; unless those opportunities were viable Sun Star had no realistic chance of developing the Montney play.

[43] To acquire these various opportunities, and to obtain and interpret seismic data, Sun Star spent about \$190,000 prior to June 2011. It financed that expenditure through a loan from Condo-Condo.

Sale of Shares and Alleged Misrepresentations

[44] The Plaintiffs allege that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos, individually and collectively, made fraudulent misrepresentations when they sold the Plaintiffs shares in Sun Star. The Plaintiffs allege that they relied on those misrepresentations in deciding to purchase the shares, and as a result suffered a loss.

[45] This section sets out the facts related to the sale of common shares in Sun Star in July and August 2011, and to the sale of flow-through shares in November and December 2011.

Credibility Assessment

[46] Setting out the facts related to the share sales requires me to make findings of fact with respect to the documents provided by the Defendants to the Plaintiffs, and about what the Defendants said to the Plaintiffs when soliciting the Plaintiffs to purchase the common shares and flow-through shares of Sun Star. That further requires me to choose whether to accept the evidence of the Plaintiffs or that of the Defendants. Their accounts directly contradict each other and, on the most significant points, cannot be reconciled.

[47] I accept the evidence of the Plaintiffs and, where it conflicts with the Defendants, prefer the evidence of the Plaintiffs to that of the Defendants. This is largely because of my assessment of the evidence in relation to specific areas of dispute, which I discuss below. In each area, as my discussion will make clear, I find the testimony of the Plaintiffs to be more plausible and better substantiated than that of the Defendants.

[48] In addition, however, I offer some general observations in support of my preference for the Plaintiffs' evidence.

[49] First, what the Plaintiffs say the Defendants told them accords with the Defendants' own documents. The Defendants could conceivably have corrected the inaccurate or false information their documents contain, and they say that they did so, but it seems more plausible to accept what the Plaintiffs say occurred: that the Defendants relied on and in some cases reinforced the inaccurate or false information contained in the Defendants' own documents.

[50] Further, both Mr. Kowal and Mr. Cutts made and retained notes of their meetings with the Defendants, with Mr. Kowal's notes being quite specific and detailed. Those notes are significant because they document the careful attention Mr. Kowal and Mr. Cutts paid to the

information they were given, they helped Mr. Kowal and Mr. Cutts retain that information, they allowed Mr. Kowal and Mr. Cutts to refresh their memories about events prior to testifying and, finally, they corroborate the testimony that Mr. Kowal and Mr. Cutts gave before me.

[51] I note that the Defendants accept the accuracy of Mr. Kowal and Mr. Cutts' notes except where the notes suggest that the Defendants gave false or misleading information. It seems unlikely that the notes are accurate in every respect except those unhelpful to the Defendants.

[52] I also think it significant that the record shows that, in April 2012, when Mr. Rizopoulos finally provided them with an accurate account of the events from 2009 to July 2011, Mr. Kowal and Mr. Cutts immediately identified that they had been given untrue information about the 4-32 well and the founders' investment. This shows that Mr. Kowal and Mr. Cutts did not construct their allegations with the commencement of litigation, or after hunting through the documents for something to complain about. Rather, they identified the false information as soon as they were told the truth.

[53] Similarly, also in April 2012, when Mr. Hubbs discovered the issues that had arisen with Sun Star, he wrote to the Defendants identifying some of the things he had been told prior to investing which now form part of his fraudulent misrepresentation claim.

[54] It is true that none of the Plaintiffs other than Mr. Kowal, Mr. Cutts and Mr. Hubbs have contemporaneous or near-contemporaneous records to support their testimony. However, I think it probable that the Defendants gave similar information to all prospective investors, and thus view the documentation prepared by Mr. Kowal, Mr. Cutts and Mr. Hubbs as tending to corroborate the testimony of the other Plaintiffs.

[55] I acknowledge that the testimony of all of Plaintiffs came across as an oft-recounted tale, reflecting their experience and response to the events, not just their recollection of the events themselves. I also acknowledge that Mr. Kowal and Mr. Cutts have consulted with each other since the time they made the decision to first invest in the common shares and have worked closely together throughout. Mr. Kowal and Mr. Cutts have also spoken with their spouses and with the other Plaintiffs in deciding to pursue and in pursuing this litigation. The Plaintiffs shared their stories with each other prior to coming to Court. Although they did not attend each other's testimony, and I believe respected the Court's direction not to speak with each other about what occurred when they were on the stand, their testimony cannot be said to be uninfluenced or untainted by each other's memories and experiences.

[56] I have considered whether this creates doubt in my mind about the accuracy or truthfulness of the Plaintiffs' testimony. It does not. I do not believe that the Plaintiffs have scripted or concocted their testimony. Indeed, I accept it as their truthful account of what took place. Their testimony is corroborated by the contemporaneous documentary record, and to a great extent uncontradicted by the Defendants. That the Plaintiffs have had time to dwell and reflect on the events of 2011 and 2012, and have talked about them with each other, is the natural and predictable outcome of what they experienced and their decision to seek a legal remedy for that experience. Their conversations may have reinforced their memory of certain events, but viewed in light of the broader evidentiary record, I do not believe that it has rendered their memories false or unreliable.

[57] I also find the evidence of the Defendants to be implausible or false on the key areas of dispute between the parties, as I discuss below. More generally I was troubled by the inability of

any of the Defendants to critically examine their own behaviour and by their ability to vigorously defend almost everything they had done. The account the Defendants gave of their own conduct was of good hearted and hard-working businessmen, trying honestly and appropriately to create an oil and gas opportunity. Mr. Hartland and Mr. McCormick defended themselves vigorously and, on occasion, with anger; they were willing to criticize Mr. Rizopoulos, but admitted no meaningful fault in their own conduct. Mr. Rizopoulos presented his testimony with a sense of grievance and victimization rather than anger but was similarly unwilling to accept any suggestion that he had acted improperly.

[58] Yet from 2011 through to the collapse of Sun Star the Defendants individually and collectively made decisions of dubious propriety – issuing themselves 10,000,000 in shares at no cost prior to selling shares to the public for \$1 per share; saying assets recently acquired for less than \$190,000 had become worth \$10,000,000 so as to justify the shares they issued themselves; providing written materials to investors that were – at best – likely to cause confusion; paying themselves a salary, including retroactive payments for eight months, as soon as they had received the common shares investment but prior to Sun Star earning any meaningful revenues; continuing to pay themselves those salaries long after Sun Star had run into serious economic difficulties; and, engaging in related party transactions (paying rent and salaries to Condo-Condo). The Defendants’ failure to appreciate any of the ways in which their conduct was objectively concerning causes me to doubt the overall accuracy and credibility of their testimony. It suggests they do not view matters accurately, or cannot account for them honestly, either of which makes their testimony unreliable.

Sale of Common Shares: June 2011 – August 2011

[59] Between June and August 2011 common shares in Sun Star were purchased by the Plaintiffs Ms. Terri-Lynn Clement, Mr. Marc Clement, Mr. David Kowal, Ms. Janet Kowal, Eagle Tree Investments Ltd. (“Eagle Tree”), Mr. Otto Cutts and Ms. Lois Cutts (the “Common Share Plaintiffs”).

[60] Eagle Tree is a company owned by Mr. and Ms. Kowal; Mr. Kowal is the President of Eagle Tree and makes decisions on its behalf.

[61] Common shares were also purchased by Mr. Kevin Orriss. Mr. Orriss has terminal cancer and did not testify at the trial of this matter. I deal with the facts related to Mr. Orriss later in this decision, and do not include him in the category of Common Share Plaintiffs.

Documents Provided by Sun Star

Preparation and Distribution

[62] Mr. Hartland, Mr. McCormick and Mr. Rizopoulos sought investors in the common shares between June and August, 2011.

[63] The Defendants created three documents in relation to the Sun Star investment. Those three documents were, first, an e-mail providing some general information about the properties acquired by Sun Star and the proposed development of those properties (“Introductory E-mail”); second, a three year business plan providing information about the assets, potential revenue and financing of Sun Star, and the expected return on investment (“Business Plan”); and, third, an investor presentation providing more detailed information about the properties and opportunities available to Sun Star (“Investor Presentation”).

[64] All of these documents were drafted in the first instance by Mr. Rizopoulos. Mr. Rizopoulos sent numerous versions of the documents to Mr. Hartland and Mr. McCormick and solicited their feedback. The record does not show what feedback was given by Mr. Hartland and Mr. McCormick on the documents (the e-mails produced were largely from Mr. Rizopoulos to Mr. Hartland and Mr. McCormick), and to a significant extent both Mr. Hartland and Mr. McCormick tried to distance themselves from the creation of the documents. There is no doubt, however, that Mr. Hartland and Mr. McCormick had numerous opportunities to review and comment on Mr. Rizopoulos's work, were well aware of what it contained and not only knew that the documents were going to investors, but also sent the documents to investors themselves. In addition, Mr. Rizopoulos testified that he received feedback from Mr. Hartland and Mr. McCormick on the documents, and that Mr. McCormick had a hand in creating them.

[65] Based on this evidence, I find that all of Mr. Hartland, Mr. McCormick and Mr. Rizopoulos had involvement in, and responsibility for, creating the documents provided to the investors.

[66] Mr. Kowal and Mr. Cutts received all these documents and relied on them in making their decision to invest, in advising their spouses to participate in the investment and, in the case of Mr. Cutts, in advising his family members and friends about the investment.

[67] Mr. Clement testified to receiving the Business Plan and the Investor Presentation. Ms. Clement did not have an accurate recollection with respect to receiving the Investor Presentation (she recalled it being much shorter), and was somewhat inconsistent between questioning and trial about whether she had received the Business Plan (at questioning she only remembered the Investor Presentation; at trial she said she had received both); however, I find that she and Mr. Clement did receive the Investor Presentation and Business Plan in the same form as they were received by Mr. Kowal and Mr. Cutts. Mr. Clement testified that he received that information, and Ms. Clement at trial did recall receiving the Business Plan and seeing parts of the Investor Presentation. She noted she had been very nervous at the questioning. I am satisfied that the Clements received the Business Plan and the Investor Presentation based on Mr. and Ms. Clements' evidence, and because Sun Star's investor strategy involved providing these documents to potential investors in the common shares. There is no reason to believe they would not have provided them to the Clements, and indeed none of the Defendants denied that they had done so, with Mr. McCormick confirming that he had provided them with the Investor Presentation.

[68] The Defendants maintained that the Business Plan had not been created to be provided to investors; rather, it had been created for the purpose of financing the company. I do not accept the Defendants' evidence on this point. The Business Plan was provided to investors. In addition, information contained in the Business Plan, for example with respect to the net asset value per share, was also set out in the Investor Presentation. The two documents seem to have been prepared together and for the same purpose.

[69] Further, there is no evidence of the Business Plan ever having been provided to or used for the purposes of obtaining financing – no documents show it having been used in that way. Mr. McCormick could not recall any specific meeting for that purpose. Mr. Hartland noted some meetings with banks, but he put those meetings in the time frame of April 2011, prior to the creation of the Business Plan. In the one documented meeting to obtain financing, with Mr.

Dingwall of National Bank in April 2011, the Defendants provided a budget, not the Business Plan.

[70] E-mails sent by the Defendants suggest that the Business Plan was prepared for investors. A June 5, 2011 e-mail sent by Mr. Rizopoulos to Mr. Reeves, counsel to Sun Star, and copied to Mr. Hartland and Mr. McCormick, said,

The model illustrates how an investors [sic] investment will grow over a 3 year period, from \$2.8/sh to north of \$10/sh. The purpose of the model is to show how we have invested 2 years of time and money to acquire land, purchase seismic, provide consulting for interpretation and completed a budget that will growth [sic] to potential 750,000 bbls in the first year before this year's end as an approximation.

In a June 12, 2011 e-mail from Mr. Rizopoulos to Mr. Hartland and Mr. McCormick, the subject line said, "Business model to send to investors".

[71] Finally, Mr. McCormick acknowledged in his testimony that it was the Introductory E-mail, the Investor Presentation and the Business Plan that explained to the investors the investment they were making, and Mr. Hartland described the Investor Presentation and the Business Plan as working "hand in hand".

[72] I thus find that the Business Plan was created for the purpose for which it was used – namely, to provide information to investors about the future business potential of Sun Star.

Content

[73] The three documents provided information about Sun Star's status and structure, and about the oil and gas interests it planned to explore and develop.

[74] The Introductory E-mail identified the opportunity to invest in Sun Star as short-term ("a 3 year investment horizon with clearly defined exit strategy") and oil and gas based. It described the risks as involving both "low" and "higher" aspects, or as "calculated risks with the potential to yield significant results".

[75] The main low risk opportunity the Introductory E-Mail identified was the 13-29 opportunity. The e-mail described the 13-29 opportunity as follows:

This drill consist[s] of a Low Risk development opportunity that involves the drilling of a twin of an existing well positioned in the south 200m south of a discovery well to the north location at the 4-28 location that is 200m to the north. The 4-28 well has accessed a 5.5 meters of Charlie lakes oil pay containing a 30% porosity streak that is connected to the same Charlie Lakes interval we will be drilling on our lands. The Bottom Hole Location is 30m up dip of the main producing Charlie Lakes pool that had an Initial production at 450 bbls/d and close to the 10-30 well that has accumulated oil reserves of 750,000 bbls of oil. There is an opportunity to drill one more vertical and or a horizontal well oriented south to north on the same land base accessing the same 5.5 meters of Charlie Lakes light oil zone (40 Degrees API) that will commence on September 1, 2011 on stream.

[76] The "4-28" location is the well otherwise described as the 4-32 well (the reference to 4-28 was confirmed by Mr. McCormick to be a typographical error which has no significance to

this litigation). The reference to an initial production of 450 bbls/d is ambiguous. It could refer to the producing wells west of the 13-29 well one of which, according to a map provided by Tiger Moth, produced 408 bbls/day in its first year on production. However, the Defendants acknowledged in their evidence that it referred to the 4-32 well, and that is certainly a possible interpretation of the Introductory E-mail. I note that at least one of the Common Share Plaintiffs, Mr. Cutts, read it in that way. I accept that the Introductory E-mail described the 4-32 well as producing 450 bbls/d.

[77] The Introductory E-mail also attached the Business Plan, described as the “Sun Star Energy Inc. 3 Year Business Model”. For 2011 the Business Plan listed as an asset value “Founders invested \$2,500,000”. The other asset values listed were an “O& G asset valuation per 2P reserve at \$40.00” of \$30,000,000 and financing of \$5,500,000. That made the asset value set out in the Business Plan \$38,000,000, from which it deducted \$3,000,000 of “Cash invested to date, land, seismic [sic], Consulting Equity”.

[78] The Business Plan also listed as shares issued “Founders Shares” of 2,593,361; other shares of 1,000,000; and “Founders Financing/Share Pool, CH. L. + Projects Budgets” at 5,500,000 shares, for a total of 9,093,361 “basic” shares. To that sub-total it added “options” of 909,336 shares, making the final total 10,002,697 shares.

[79] The Business Plan listed the net asset value per share for 2011 as \$3.85, which was the asset value of 35,000,000 divided by the basic shares of 9,093,361.

[80] Finally, the Introductory E-mail attached a copy of the third document, the Investor Presentation, which was also given to Mr. Kowal, Mr. Cutts and the Clements at their meetings with Mr. Rizopoulos, Mr. McCormick and Mr. Cutts.

[81] The Investor Presentation was 62 pages. It described Sun Star and its management team and directors, along with its key opportunities.

[82] It described the three oil plays (Montney, 13-29 and Nisku) generally as “Low to high risk COS”, with “Robust well economics” and a “6 month payout potential”. It then moved on to outlining the specific opportunities, beginning with Montney. It described Montney as “Mid to HIGH risk drilling”. In the discussion of Montney the Investor Presentation discussed various analogue wells. With respect to the analogues the Investor Presentation provided production graphs and data, none of which are easily readable. It did not include any headings or added descriptions or claims with respect to the Montney analogues.

[83] After Montney the Investor Presentation moved on to the 13-29 opportunity. It described the 13-29 opportunity at the outset of the Presentation as providing “low risk opportunities, Aug 1 drill”. On the slide introducing the information specifically related to the 13-29 opportunity the Investor Presentation reiterated that these were “low risk drilling opportunities”. It described the “analogue selection criteria”.

[84] The Investor Presentation then provided details of the 4-32 analogue well. With respect to this well, Mr. Rizopoulos had added text and information. Specifically, the two slides containing the production graph and the production report for the 4-32 well had a large bolded heading added on the top which read:

4-32 Analogue well. 400 bbls/d.

[85] On those two slides, the large added heading was the only clearly readable part of the document. The report reproduced on the slide giving the actual production for the 4-32 well cannot be read with any ease. I looked at the originals of the Investor Presentations as produced from the records of Mr. Kowal and Mr. Cutts. On those documents I cannot read the production number for December 2008 or January 2009, although I can see that it is in triple digits. For February 2009 the production was in double digits, not triple, but also cannot be read. I can read the dates on the left-hand side, and I can see that those dates end as of February 2009. Further, I can see that there was only production in three of the months listed – the rest of the months say “0.00” for the production.

[86] I can read the first handwritten note at the bottom of the production report, which says that the “well flowed for 3 months”. I cannot read the other handwritten notes.

[87] The production graph is also difficult to read but it is possible to see that it has an abbreviated line across the horizontal time axis, indicating that the 4-32 was on production only for a short period of time.

[88] In his evidence, Mr. Hartland maintained that he could read the copy in evidence, and said it was “fairly good” and that he could see what was on there. Later in his testimony he became angry at it being suggested that the slide was hard to read, saying that they did not hide the information and that the real data was there.

[89] I am troubled by Mr. Hartland’s evidence. While, as just described, careful scrutiny reveals a little information with respect to the actual production of the 4-32 well from these slides, much of it cannot be read, and none of it can be read with ease. None of the documents provided to me – or reviewed by Mr. Hartland – could be honestly described as “fairly good”. The specific production numbers for each month in particular cannot be identified on any of the copies I reviewed, including the originals from Mr. Kowal and Mr. Cutts’ production.

[90] Mr. Hartland also suggested that there might be a better-quality copy that was circulated; however, no such copy was in the evidence before me. Instead, the evidence suggests that the legibility issues arose as soon as Mr. Rizopoulos added the banner “4-32 Analogue well. 400 bbls/d.” and those legibility issues, while they would have been obvious to Mr. Rizopoulos when he created the slides and to Mr. Hartland and Mr. McCormick when they reviewed them, were never corrected or addressed by the Defendants.

[91] The Investor Presentation then goes on to describe another analogue well, the 10-30 well. It also provides a production graph for the 10-30 well which is somewhat more legible. It added a heading, “10-30 Analogue well. 30 bbls/d”.

[92] After providing some more information about the nature of the Charlie lakes reservoir, the Investor Presentation lists the cost of drilling the 13-29 well and anticipated average first year production for a vertical drill as “150 boepd” with potential production of “400 boepd”, and a horizontal drill average first year production of “350 boepd” with potential production of “500 boepd”.

[93] The Presentation then moved on to the Nisku opportunity which it also described as low risk. On the discussion of the analogues for Nisku the analogue well had a heading listing “20 bbls/d” but included a legible production graph. In that case the production graph showed 20 bbls/d to be the current production, not the initial production. The initial production for that

analogue was considerably higher than 20 bbls/d. On that slide the added banner thus referred to the current production, not the initial production.

[94] The Investor Presentation set out the “Prospective Capital Structure” of Sun Star. It listed “Basic” Shares, of which “Mgmt/Board owns 100%”, at “10M”. It listed Options at “1M”. It listed Equity, Working Capital, Bank Line and secured term loan at “0”. It said the “NAV – Basic” was \$3.85. NAV refers to net asset value per share, and was the same number as set out in the Business Plan. As noted, that number in the Business Plan was derived from dividing the total asset value (\$35,000,000) by the shares issued (9,093,361) as set out in the Business Plan, rather than based on the asset and share value reflected in the Investor Presentation.

[95] The next page of the Investor Presentation, “Prospective Company NAV” listed the total net value of the assets, including proved plus probable reserves, undeveloped land and seismic and working capital as \$31,750,000 and said the basic shares outstanding post financing were 10,000,000. The math of the slide is incorrect on its face, since the assets it lists add up to \$41,750,000. The slide then listed the net asset value per share again as \$3.85, although given the numbers on that page the net asset value per share should – based on the stated total assets – have been \$3.18 or, given the total assets added correctly, \$4.18.

[96] The final page of the Investor Presentation included a disclaimer with respect to forward looking statements. It emphasized the risks associated with forward information, which it defined as “All information, other than information of historical fact, included herein”. It said with respect to forward information, “No assurance is given such that information will prove to be accurate and actual results and future events could differ materially from those anticipated in such information”.

False Statements

[97] The Introductory E-mail, Business Plan and Investor Presentation contained three false statements of fact.

[98] First, the Business Plan stated that the founders had invested \$2,500,000 in the company. The founders had not invested any money in the company at all.

[99] The Defendants say that the document does not say that they invested cash, and that the statement is true because they invested the equivalent to \$2,500,000 in “sweat equity”. I do not accept this submission. Absent some qualifying or clarifying words, “Founders invested” coupled with a dollar sign and numbers, communicates that the founders have invested cash or its near equivalent. It does not communicate that they have done work that they believe to be really valuable.

[100] I note as well that the document says “invested” not “invest”. Thus, while the Business Plan provides information for year-end 2011, the implication of the past tense is that the investment had already been made.

[101] Mr. Hartland testified in defence of the Defendants’ position that this number referred to sweat equity and would be so understood by a reader of the document, saying that a dollar figure does not mean cash but just means there is value. Mr. McCormick similarly asserted that an ordinary reader might not read the Business Plan to mean that the founders had invested \$2,500,000 in cash.

[102] The testimony of both witnesses in this respect strained credulity. There is nothing on the face of the Business Plan to indicate that the document did not mean what it seemed to mean, and what the Common Share Plaintiffs who read it understood it to mean. Mr. Hartland and Mr. McCormick did not elaborate how an ordinary reader could have interpreted “founders invested” followed by a dollar sign and number, to refer to sweat equity.

[103] Further, I am not satisfied that the Defendants added the \$2,500,000 because they believed it to be a fair representation of their “sweat equity”. I note that the Defendants struggled to maintain consistent explanations as to what the \$2,500,000 represented. Sometimes they said it was sweat equity, but sometimes they described it differently. In a phone call with the Clements in 2013, discussed below, Mr. McCormick called it “a guestimate of value of the assets that we had in the company at that point in time”. He said in his testimony that his description in that phone call was unclear and that he should then have said to the Clements that the amount represented sweat equity. I think, however, that Mr. McCormick’s prior inconsistent account properly calls into question the credibility of his current explanation.

[104] Similarly, in his evidence at trial, Mr. Rizopoulos said this amount reflected the acquisition of the land and seismic and the value of the oil bearing lands; he said it included things “on top of” the founders having skin in the game.

[105] These inconsistent explanations undermine the Defendants’ claim that they intended to communicate sweat equity when they added the \$2,500,000 to the Business Plan.

[106] Moreover, at no point did the Defendants provide any evidence or documentation to substantiate how this asset – whether sweat equity, an asset guestimate, things on top of skin in the game – was valued at \$2,500,000. Mr. Rizopoulos had prepared invoices that he sent to Mr. Hartland and Mr. McCormick, but it was not clear that these related to the \$2,500,000 (as opposed to the \$3,000,000 negative asset entry) or to the Business Plan at all.

[107] In earlier drafts of the Business Plan it said “Founders invested 2MM@\$1” in the descriptor of the \$2,500,000 entry and, alternatively, “Founders invested 2MM@\$1” with an entry of \$2,000,000. Mr. Rizopoulos said that these versions were discussed with Mr. Hartland and Mr. McCormick, along with Mr. Michael Megale, the Chief Financial Officer of Condo-Condo. The Defendants might argue that they eliminated that descriptor to avoid any misperception; in my view, however, the more plausible inference is that the prior inclusion of that descriptor clarifies that the Defendants wanted to give the impression that they had made a cash investment. They eliminated the more explicit form of the misrepresentation, but the misrepresentation, and the reason for it, remained.

[108] Mr. McCormick tried to suggest that the Business Plan was not misleading on this point because below the reference to the \$2,500,000 founders’ investment in the list of assets, there was a negative entry for \$3,000,000 which said “Cash invested to date, land, seismic [sic], Consulting Equity”. Mr. McCormick said that this amount “offset” the \$2,500,000 and, he suggested, made it clear that that \$2,500,000 referred to sweat equity.

[109] This explanation does not make sense. It suggests that the sweat equity was included as an investment in the company/asset of the company and also as a loan to the company/debt owed by the company. But it cannot be both: it is either an asset of the company – an investment – or a loan to the company – a debt. It is not plausible to suggest that a person would read the Business Plan and understand that the asset included in one line was the same item described as debt two

lines below (with a different number). It is also not plausible to suggest that the reader would apply the description of the debt to the earlier listed asset (which has its own and different description) so as to understand that “founders’ invested” described with a dollar value was not in fact a cash investment. If anything, the use of the word “consulting equity” in the entry two lines below clarifies that the \$2,500,000 did not refer to consulting or sweat equity, but rather to a cash investment.

[110] Finally, even if the \$2,500,000 did represent “sweat equity,” it was highly misleading to include this as an “asset” of the company. The assets of the company are things of value, that it can use to generate revenue, by selling them or exploiting them. A cash investment is a thing of value, that can be used to generate revenue. But what could Sun Star do with “sweat equity”? It cannot sell it; it cannot use it to create revenue. It was a resource of the principals that, in their own explanation, they had already expended on Sun Star’s behalf. The benefit received by Sun Star from the principals’ sweat equity was reflected in the assets and opportunities it had acquired at that time, but the sweat equity itself is not an asset of Sun Star’s and could not accurately be represented as such.

[111] The second misrepresentation in the documents provided to investors is that the Business Plan said that the founders held 2,593,361 in shares. This was not true. Mr. Hartland and Mr. McCormick acknowledged that this was not true, and said it was simply an error that they failed to catch. I do not accept this explanation. I find it to be implausible that a one-page document that was provided to Mr. Hartland and Mr. McCormick in multiple iterations over several weeks could contain an error of this magnitude and that neither of them would catch or correct it. This is not an error like a typo – as if, for example, they had written 11 instead of 10. It is also not an error like putting in a number that had once been accurate but was no longer, or that reflected a part of the shares but not all of them. “2,593,361” bears no relationship to any number in the evidence before me.

[112] Rather, I find that this number was put in the Business Plan by Mr. Rizopoulos, and not removed or corrected by either Mr. McCormick or Mr. Hartland, to falsely represent to prospective investors that the founders had received shares for a price similar to that being offered to investors, that is, for \$1.00 per share. This was how the Common Share Plaintiffs who read the Business Plan interpreted it.

[113] Both Mr. Hartland and Mr. McCormick suggested that the information in the Investor Presentation setting out the “Prospective Capital Structure” and the “Prospective Company NAV” were sufficient to clarify and correct the information in the Business Plan. They point out that it says on those slides that the basic shares are 10,000,000 and that “Mgmt/Board owns 100%”. They also emphasize that the slide says that the equity and working capital of the company are “\$0.0 M”.

[114] There are difficulties with this suggestion. The slides refer to “Prospective” information and so do not alert the reader to the possibility that they represent the current circumstances of the company. In addition, the slides do not make a great deal of sense. The net asset value the slides report per share does not match the asset and share numbers the slides set out. Further, the slides say on one page that all of the share are owned by management and the board, but then on the next page that, “post financing”, the number of shares will remain the same. The slides contain some information that seems to flow from the Business Plan – the list of the assets, and

the net asset value per share – but other information that seems to contradict the Business Plan – the list of shares, equity and working capital.

[115] I accept that these pages of the Investor Presentation should have caused an investor to ask some probing questions about the accuracy of the information with which they were being provided. When read carefully, and compared to the Business Plan, they raise the question whether the materials are a bunch of malarkey. I consider below the legal significance of the clues in the Defendants’ own materials with respect to their liability for fraudulent misrepresentation. Here, however, I note only that the confusing and inconsistent slides in the Investor Presentation do not correct or clarify the contents of the Business Plan, even though they in some ways contradict them.

[116] The third misrepresentation in the documents was that the Investor Presentation said “4-32 Analogue well. 400 bbls/d.” which could reasonably be understood to mean – and the Common Share Plaintiffs did understand to mean – that the 4-32 well was producing 400 bbls/d on an ongoing or average basis. This was also not true. I note here that the Investor Presentation does not qualify the statement with the words “initial production”. Further, the production data and production graph ranged from difficult to read to illegible.

[117] The Defendants knew that it was untrue that the 4-32 well had ongoing production of 400 bbls/d. The Defendants were given this information, and they acknowledged in their testimony that they knew it when they created and presented the Investor Presentation.

[118] They also knew that 400 bbls/d did not represent its initial production of the 4-32 well on any definition. The information available to them prior to the creation of the Investor Presentation showed that the 4-32 well did not record 400 bbls/d of production at any point – its first two days of production were higher, at 433 bbls/d – and its production fell off sharply from there, so that over the first thirty days it had 110 bbls/d of production. It was shut in and had no ongoing production and had not had any production for over two years.

[119] The Defendants suggest that the information below the banner was sufficient to contextualize the statement, and to provide the complete and accurate information to the Common Share Plaintiffs with respect to the production from the 4-32 well. As discussed, however, that information was at best hard to read and, in large part, impossible to read. It did not alert the Common Share Plaintiffs to the fact that the large and bold claim, “4-32 analogue well. 400 bbls/d” was untrue.

[120] Mr. McCormick, in response to the question of whether there was anything in the Investor Presentation that was wrong or inaccurate, said that there was “nothing” in the presentation that was “wrong, inaccurate, false or misleading”. Mr. McCormick went so far as to say that he never considered the possibility that the investors might wrongly believe that the 4-32 well had produced 400 bbls/d for a significant period of time as a result of the Investor Presentation. He refused to accept that a highlighted banner saying “400 bbls/d” with respect to a well that had been shut in after its production quickly declined to 59 bbls/d might be misleading.

[121] Yet I do not understand how Mr. McCormick could not at least see the possibility that the statement “400 bbls/d” would be misunderstood or misleading given that nowhere does the Investor Presentation say “initial production”, the illegibility of most of the information on the slides, and that 400 bbls/d did not represent the well’s production at any point. Mr. McCormick’s

failure to even admit the possibility that the information could be confusing or misleading as presented, calls his broader credibility into question.

[122] This is also the case with Mr. Hartland, who reacted with indignation at the suggestion that their behaviour in respect of the Investor Presentation had been anything less than transparent.

[123] With respect to the illegibility of the information in the Investor Presentation, Mr. Hartland, Mr. McCormick and Mr. Rizopoulos denied deliberately making a shoddy copy so as to mislead the investors and emphasized that the Plaintiffs never asked them for legible copies. But they also provided no explanation as to why the production reports and graph, which would have made it clear that the 4-32 never produced 400 bbls/d, were reproduced so shoddily. They simply emphasized their claim that they had provided accurate information at the presentation, and that no one asked them for a legible copy.

[124] With respect to the Defendants' knowledge and intention about the content of the Business Plan and Investor Presentation, the Plaintiffs point to an e-mail sent by Mr. Rizopoulos to Mr. Hartland and Mr. McCormick on June 12, 2011. In response to their request that he enter into a unanimous shareholder agreement, Mr. Rizopoulos said, in part:

To be clear, I will not lie to investors and supply invoices to show a genuine investor that we have skin in the game as illustrated in the Business model, nor will I misrepresent the risks associated with our drills in being straight forward and very transparent in all matters. We all agree to share equally any profit as an example, as you had illustrated Les, and I do understand that we need a viable business to share prospective revenues and together. To be clear if there is an opportunity for me to receive my share as consulting dollars it is easier for me to avoid reporting situations, with my divorce ect [sic].

[125] The Plaintiffs suggest that this e-mail shows that Mr. Rizopoulos had lied, and that Mr. Hartland and Mr. McCormick were on notice as to his dishonesty.

[126] This e-mail does not tell me whether the Defendants were or were not being honest. If the Business Plan and Investor Presentation contained no misrepresentations, then the e-mail would suggest honesty – an expression of Mr. Rizopoulos's commitment to being truthful. If they contained misrepresentations – as I have found that they did – then this e-mail could be interpreted to suggest that they knew there was an issue about the truthfulness of the statements in the documents. Even then, though, I am not sure how a statement that a person will *not* lie shows that they *did* lie. I accept that the e-mail does not prove that the documents were in fact truthful; I just do not see this e-mail as significant one way or another in assessing the truthfulness of the documents created by the Defendants and provided to the Common Share Plaintiffs.

[127] More troubling for the Defendants is an e-mail sent by Mr. Rizopoulos to Mr. Hartland and Mr. McCormick on December 1, 2011. In that e-mail Mr. Rizopoulos says:

We all agreed that we would give the investors a liquidity event and so to unlock there [sic] investment and so they can reap the reward of their investment (I point you to the IP and Business plan I had created, economics, reserve analysis, economic analysis ect [sic]) and countless number of deliverable draw [sic] from my 30 Plus years of experience as delivered. **This is the reason why we showed**

the significant equity input to illustrate to investors that the business model will yield results from the seed equity and as we passed this to all investors to help them see SSE skin in the game.

Within the business model it place [sic] this helped our invests [sic] move from [sic] thinking about investing to actually investing into a calculated plan of equity growth given reserves, revenues ect [sic].

Guys, I am not saying anything different than before, I think you misunderstand salary for Hyperion sweat equity, I do not collect a salary and can not record it due to my personal situation, that is why I would bring it via Hyperion, and as part of the business model I expect to take as much as I can via my invoices as we had discussed in the past. I can demo straight [sic] with great clarity that I have been pulling the ship forward and I am a good representative and have done a very very good job, showing my 30 years plus oil and gas experience leading to the decisions being made in the organization [emphasis added].

[128] While Mr. Rizopoulos's prose is hard to follow, this e-mail suggests to me that he and Mr. Hartland and Mr. McCormick were trying to show through the Business Plan that the investors had made a "significant equity input", put in "seed equity" and created Sun Star's "skin in the game". The Defendants might suggest that Mr. Rizopoulos meant sweat equity; however, for the reasons given earlier regarding the way the Business Plan was written, I do not see it this way. I see this e-mail as corroborating my inference that the Business Plan was drafted to create the impression in investors that the founders had contributed equity.

[129] Mr. Hartland's explanation of this e-mail was unpersuasive. He seemed to suggest that the Defendants had skin in the game because their efforts would create liquidity for the investors. This does not accord with the ordinary meaning of skin in the game, which refers to the risk you are taking of loss, not to the possibility that you might create gain for others at no risk to yourself. Mr. Hartland's evidence does not avoid the inference supported by this e-mail: Mr. Rizopoulos wrote the Business Plan to create the impression that an investment had been made in the company by the Defendants, and that Mr. Hartland and Mr. McCormick knew and went along with it.

Information Provided by Sun Star

Position of the Parties

[130] Mr. Hartland, Mr. McCormick and Mr. Rizopoulos met with the Common Share Plaintiffs other than Ms. Kowal and Ms. Cutts on several occasions over June through August 2011. The Defendants and the Common Share Plaintiffs disagree about what happened during those meetings in several key respects.

[131] First, the Common Share Plaintiffs say that in their meetings the Defendants confirmed that the 4-32 well produced 400 bbls/d on average, and they believed that it was producing that amount on an ongoing basis. They say that they were not told the true facts about the 4-32 well, and were not told that it was shut in.

[132] The Defendants assert that they told the Common Share Plaintiffs that "400 bbls/d" meant initial production. They say that they were very clear on this point, and never said that the 400 bbls/d referred to average or ongoing production. They say that they told the Common Share

Plaintiffs that the 4-32 well was shut in and gave the Common Share Plaintiffs accurate and complete information about its production history.

[133] Second, the Common Share Plaintiffs say that the Defendants bolstered their claim about the production from the 4-32 well by talking about counting trucks coming from the 4-32 well to verify the production data. Mr. and Ms. Clement, Mr. Kowal and Mr. Cutts all recalled this representation being made. Ms. Cutts recalled being told it by Mr. Cutts.

[134] Mr. Rizopoulos acknowledged that he had information about scouts counting trucks from Tiger Moth and acknowledged that he had said as much to Ms. Clements. However, he and the other Defendants deny that they said anything to imply that the 4-32 well was producing 400 bbls/d on average or on an ongoing basis. Mr. Hartland and Mr. McCormick suggested that the statements about trucks verifying production were made to the flow-through share investors, not the common share investors.

[135] Third, Mr. Kowal said that he was explicitly told that the founders had invested \$2,500,000 in cash, as implied by the Business Plan. The Clements say the same. Further, all of the Common Share Plaintiffs say that they were never told that the \$2,500,000 founders investment represented sweat equity, and that the founders had been issued 10,000,000 shares.

[136] The Defendants deny saying that the founders had invested \$2,500,000 in cash and say that they told the Common Share Plaintiffs that the founders' investment was sweat equity, and that the founders had been issued 10,000,000 shares.

[137] Fourth, Mr. Kowal and Mr. Cutts say they were told that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos would be paid through dividends not salary.

[138] The Defendants deny making that representation and say that they always planned to take a salary once the company had cash flow sufficient to support it. The Defendants also note that the Plaintiffs' pleadings do not identify this as one of the misrepresentations allegedly made to the Plaintiffs.

The 4-32 Well Production

[139] Mr. Kowal and Mr. Cutts met with the Defendants on July 13, 2011; Mr. Hartland and Mr. McCormick attended in person, and Mr. Rizopoulos attended by phone. Both Mr. Kowal and Mr. Cutts say they were told that the 4-32 well produced 400 bbls/d, which is what they also understood to be the case from the banner written across the slides in the Investor Presentation dealing with the 4-32 well. They say that they understood from the Introductory E-mail and from what they were told that the 4-32 well had started higher than 400 bbls/d – at 450 or 475 bbls/d – but had come down to produce 400 bbls/d on an ongoing basis. Mr. Kowal and Mr. Cutts testified that the information about the 4-32 well was important. It suggested that the company had a low-risk and high opportunity play.

[140] Mr. Kowal's notes of the July 13 meeting say that the Defendants said the initial production of the 4-32 well (the "well to north") was 475 bbls/d. The notes say that the estimated production from the Elmworth well, which would be a twin of the 4-32 well, was 200 bbls/d; Mr. Kowal said this number was based on Sun Star only being entitled to part of the total given its drilling arrangement with Western – that is, to a portion of the predicted 400 plus bbls/d of production in the new well. Mr. Kowal's full notes with respect to the "Elmworth Play" said:

Oil prod'n 200 metres away.
2 proposed shallow well sites (Funded)
Arc & Progress prod'n in area
*They may want to take SSE out.
30% porosity (High)
SSE – ½ Section – Prod'n zone runs through ½ sec.
5m pay zone w 30% porosity.
Est. 200 bbls/d
Well to North @475 bbl/D (initial prod'n)
SSE pays 9% for rights to this land.
½ Farmed out to raise 1.6 M\$ Drill Cost
[Therefore] SSE share 50% at 91% = 45.5%
Partner ROFR on 2nd well.
Partners Tech People like area
Value 100K\$/flowing bbl
15-25 m\$
* Arc & Progress likely don't want us to pull oil from the area
\$40/bbl oil value in the ground.

[141] Mr. Cutts' notes of the July 13, 2011 meeting say "Well just to north producing 400 b/d"

[142] These notes of Mr. Kowal and Mr. Cutts, along with the content of the Investor Presentation and the Introductory E-mail, support the Plaintiffs' testimony that at the July 13, 2011 meeting the Defendants told Mr. Kowal and Mr. Cutts that the 4-32 well began producing at 450-475 bbls/d and that that amount had come down to an ongoing production level of 400 bbls/d.

[143] Mr. Cutts had further notes dated simply "August", and referring to a meeting with all of Mr. Hartland, Mr. McCormick and Mr. Rizopoulos. Mr. Cutts purchased common shares on July 27, 2011 but also on August 16, 2011, and he testified that these notes are from a meeting prior to the second purchase. The notes say, "Sandy very excited about Elmworth well, his scouts on site counted 5 or 6 trucks per day over 3 days (proving the 400 b/d on well just north of ours)".

[144] This note also supports Mr. Kowal and Mr. Cutts' evidence that the Defendants told them that the 4-32 well produced 400 bbls/d and that the Defendants bolstered that account with the story of the scouts counting trucks coming from the well. This is also consistent with Ms. Clements' evidence, discussed below, that Mr. Rizopoulos told her the story of the scout counting the trucks – evidence which Mr. Rizopoulos confirmed.

[145] The Defendants suggest that Mr. Cutts' notes are not actually from August but are rather from November 2011, such that the scouts Mr. Cutts was told about were the scouts that Mr. Hartland and Mr. McCormick acknowledged that Sun Star used in the fall of 2011, when the 4-32 well came back on production. The Defendants suggest that the Common Share Plaintiffs have simply misremembered when these conversations occurred. They note that, in questioning prior to trial, when asked if these notes were with respect to the flow-through shares, Mr. Cutts said "yes".

[146] Given, however, Mr. Rizopoulos's acknowledgement that he had been told by Tiger Moth about scouts counting trucks, that he had told at least Ms. Clements about the trucks, and that Mr. Cutts' notes say "August" on them, I do not accept the Defendants' suggestion on this

point. I also note that Mr. Cutts' notes refer to "investing another \$60,000", and he purchased \$60,000 of common shares in August 2011 which also suggests that these notes relate to the second common share purchase, not the flow-through shares. Mr. Cutts purchased \$80,000 in flow-through shares. Finally, I emphasize that on being given the opportunity to clarify this point in pre-trial questioning, Mr. Cutts corrected his answer and said that the notes related to the common shares purchase.

[147] Mr. Kowal and Mr. Cutts said they told Ms. Kowal and Ms. Cutts about the production of the 4-32 well in explaining why the investment in Sun Star was wise, and Ms. Kowal and Ms. Cutts confirmed that they had been given this information. Ms. Kowal also recalled being told about the production being confirmed by counting trucks, although she was not sure if it was prior to the common share investment or the flow-through investment. Ms. Cutts recalled being told about the scouts and recalled that she was told that in the summertime. She noted that she has a very visual memory, and she remembered that she visualized trucks driving on a dirt road and green grass around.

[148] Mr. Clement and Ms. Clement testified that they were told about the 4-32 well producing 400 bbls/d at a meeting with Mr. McCormick and Mr. Rizopoulos, with that information being bolstered by Mr. Rizopoulos's account of scouts counting the trucks. Ms. Clement recalls expressing surprise that they would hire someone to sit on the road outside the well to watch and count the trucks. Mr. Rizopoulos confirmed that he had told Ms. Clement about the scouts. I note that Mr. and Ms. Clement did not buy flow-through shares or meet with the Defendants about buying flow-through shares, so that this testimony could only relate to the common share purchase.

[149] Based on Mr. Cutts' notes, Ms. Clement's detailed recollection, Ms. Cutts' visual memory, and Mr. Rizopoulos's confirmation that he talked about the scouts to the Clements, I accept that Mr. Rizopoulos told the Common Share Plaintiffs that they had confirmed the production from the 4-32 well through scouts. This was not a statement made by either Mr. Hartland or Mr. McCormick, although Mr. McCormick was there when it was made to Mr. and Ms. Clement, and both Mr. Hartland and Mr. McCormick were there when it was said to Mr. Cutts.

[150] The Defendants say that they told Mr. Kowal, Mr. Cutts and the Clements the truth about the 4-32 well, that it initially produced over 400 bbls/d but that the production had declined, and that it had been shut in since February 2009. Mr. McCormick said, it was all explained each and every time they did the presentation. He said that the information about the 4-32 well was a fact and they would not tell anyone anything that was not a fact. Mr. Hartland said the same. The Defendants vigorously deny saying this was ongoing or average production. They say that they ensured that the Common Share Plaintiffs were given complete and accurate information about the 4-32 well, including that it had only been online for 3 months and was shut in.

[151] The contemporaneous notes of Mr. Kowal and Mr. Cutts contradict the evidence of Mr. Hartland, Mr. McCormick and Mr. Rizopoulos, and provide more reliable information about what was said to Mr. Kowal and Mr. Cutts. They, along with the current testimony of the Common Share Plaintiffs, cast significant doubt on the reliability of Mr. Hartland, Mr. McCormick and Mr. Rizopoulos's claim that they provided accurate information about the 4-32 well.

[152] Further, the Defendants ask me to accept, in essence, two premises. One, that the Investor Presentation was not false – because 400 bbls/d can be understood as referring to Initial Production. And, two, that in any event they told the Common Share Plaintiffs that the well only produced for 3 months and that it had significantly decreased after its initial production. I find neither of these premises plausible, in part because they seem in such obvious tension with each other.

[153] If the Defendants recognized the need to provide accurate and complete information, I see no reason for the Investor Presentation to have been presented as it was. It should have said “initial production” if initial production was what was meant, or provided the actual ongoing production as they did with the Nisku analogue. If it was going to present the initial production than it should have done so accurately – as 110 bbls/d over the first 30 days (or, accepting for the moment Mr. McCormick and Mr. Hartland’s position, 433-475 bbls/d over the first 24 hours). It should not have included a number – 400 bbls/d – which related to nothing. It should not have included illegible production data and graphs. I am not saying this to reiterate the issues with the Investor Presentation that I have already discussed; rather, my point is that the failure to provide accurate and complete information in the Investor Presentation, when I am unable to identify – and the Defendants were unable to provide – any plausible reason for that failure, raises doubt in my mind about the Defendants’ claim that they were committed to providing accurate and complete information and in fact did so in their meetings with the Common Share Plaintiffs.

[154] Mr. Hartland maintained in his evidence that while he only attended two presentations to investors, he had a clear and strong memory of accurate information about the 4-32 well being provided to investors. He noted that the 400 bbls/day heading raised questions and that they had to clarify that it referred to initial production and that the well was shut in after 3 months, as the graphs below the banner illustrated. Mr. Hartland’s testimony is inconsistent. As previously discussed, Mr. Hartland firmly maintained that the materials in the Investor Presentation were clear and could be read. But he also says he remembers what was said because the heading on the document needed to be clarified. This inconsistency raises further doubts about the veracity of his testimony.

[155] In addition, Mr. Rizopoulos admitted that he told Ms. Clement about the scouts, and the evidence in general supports the conclusion that he did so. The information about the scouts would have had no relevance to the prospective investors except to show that Sun Star had verified current or ongoing production; if he had told them simply about the initial production, that information was set out in data and logs available to the Defendants that they could show to the Common Share Plaintiffs. There would be no reason to bolster the claim with a story about scouts. The fact that Mr. Rizopoulos told the Common Share Plaintiffs about the scouts supports my conclusion that the Common Share Plaintiffs are telling the truth, and that the Defendants not only did not provide them with accurate information about the 4-32 well, they in fact confirmed the false information suggested by the Investor Presentation, that the 4-32 well was producing 400 bbls/d on an ongoing basis.

[156] Based on the Plaintiffs’ testimony, this assessment of the Defendants’ evidence, and the contemporaneous documentation, I accept that all of the Common Share Plaintiffs were told, either directly or indirectly, that the 4-32 well produced 400 bbls/d on an ongoing basis without that information being qualified or placed in the context of the actual performance of the 4-32 well. I do not believe that the Common Share Plaintiffs were told that it was the initial production of the 4-32 well that was 400 bbls/d. I find that those of them who were told about

initial production (Mr. Kowal and Mr. Cutts) were told a number that was considerably higher – in the range of 450-475 bbls/d.

[157] As noted with respect to the Investor Presentation, the Defendants knew that the information they provided to the Common Share Plaintiffs about the 4-32 well was untrue. They had accurate information about the production from the 4-32 well and knew that it did not produce 400 bbls/d on an ongoing basis.

The Founders Investment and Sun Star Share Structure

[158] As outlined earlier, the Business Plan said that the founders had invested \$2,500,000 and that the founders had 2,593,361 in shares.

[159] Mr. Kowal and the Clements said that during their meetings the Defendants confirmed that the founders had invested \$2,500,000 in cash. Mr. Cutts said that his understanding that the founders had invested \$2,500,000 came from the Business Plan. He did not recall being explicitly told that by the Defendants,

[160] All of the Common Share Plaintiffs who spoke with the Defendants said that the Defendants did not modify or clarify the content of the Business Plan regarding the founders' investment or shares issued.

[161] Ms. Kowal and Ms. Cutts said that Mr. Kowal and Mr. Cutts told them that the founders had invested \$2,500,000 in the company, and Mr. Kowal and Mr. Cutts confirmed that they had passed on this information to their wives.

[162] The notes taken by Mr. Kowal support the Common Share Plaintiffs' account that the Defendants never contradicted or clarified the Business Plan. Mr. Kowal's notes of July 13, 2011 say that the Plaintiffs were being given shares "Same as Bob, Les & Sandy". This suggests that Mr. Kowal and Mr. Cutts were led to believe verbally, as well as through the Business Plan, that the Defendants had acquired their shares on the same basis as was being proposed to the Common Share Plaintiffs, at \$1 per share. This would tend to have reinforced in the Plaintiffs' mind the accuracy of their interpretation of the Business Plan, since the \$2,500,000 founders' investment approximates 2,593,361 shares having been issued to the founders at \$1 per share.

[163] Mr. Kowal's July 13, 2011 notes further indicate that Sun Star would issue "1-1.5 million shares @\$1 = 10-15% of the company". The Business Plan said that Sun Star was going to issue about 10,000,000 shares on a fully diluted basis; in that case, the "1-1.5 million shares" would be 10-15% of the company. By contrast, if the common shares were being sold to the investors in addition to the 10,000,000 shares already issued to the founders, the shares acquired by the Common Share Plaintiffs would be 9-13% (1,000,000/11,000,000 or 1,500,000/11,500,000). This is not a huge difference; however, it suggests that the information provided at the July 13, 2011 meeting did not contradict the information contained in the Business Plan.

[164] Mr. Cutts did not recall being given information about the shares at the July 13th meeting; however, I accept that Mr. Kowal's notes would reflect what both of them were told.

[165] Mr. Kowal and Mr. Cutts did not claim that Mr. Hartland, Mr. McCormick or Mr. Rizopoulos verbally represented on July 13, 2011 that they had made a \$2,500,000 cash investment or that the Business Plan accurately recorded the shares that they owned. They testified only that the information they were given that day did not correct or change the information on the Business Plan. Mr. Kowal's notes confirm that testimony, suggesting that

what they were told on July 13, 2011 was consistent with the Business Plan, not contradictory with it.

[166] Mr. Hartland and Mr. McCormick said that they interpreted “Same as Bob, Les & Sandy” in Mr. Kowal’s July 13, 2011 notes to refer to the fact that all the shares issued were common shares. I do not agree with their interpretation. I think it unlikely that Mr. Kowal would have made a note of the fact that the shares held by the founders were also common shares. If he was noting that the shares he was purchasing were common shares, then he would have said “common shares” directly. I do not think he would have tried to communicate they were common shares by saying they were “Same as Bob, Les and Sandy”.

[167] Mr. Kowal further testified that, at a meeting on July 20, 2011, Mr. Rizopoulos explicitly told him that the founders had invested \$2,500,000 and Mr. Rizopoulos explained the share structure in accordance with what the Business Plan suggests – namely, that the founders had paid about \$1 per share to obtain their shares. Mr. Kowal’s notes of the July 20, 2011 meeting do not refer to the founders’ investment, but Mr. Kowal suggested that the comment in the notes “Founders (we would be founders)” reflected the discussion of this point. He said that he would not have made any more detailed notes on this point given that the information was set out in the Business Plan.

[168] In cross-examination Mr. Kowal acknowledged that in questioning prior to trial he did not say that he had been given this information by Mr. Rizopoulos. In questioning he was asked whether he confirmed that the founders invested \$2,500,000 and he said no. He had the following exchange with counsel:

Q: ...I thought your answer yesterday was that you assumed that he [Mr. McCormick] had invested the \$2.5 million in their money?

A: It was clear in the business plan.

Q: Right. But he did not tell you that; you assumed?

A. The way an accountant looks at it, it shows that \$2.5 million –...

Q. Whether he used the term, I have put \$2.5 million cash into this company. That was the assumption that you made, not something he specifically told you?

A. It wasn’t an assumption, and he didn’t tell me. It was in the three-year business model.

Q. All right.

A. It was clear.

[169] In a further exchange, Mr. Kowal was asked about whether at the July 20th meeting Mr. Rizopoulos told him that he had invested \$2,500,000. Mr. Kowal answered, “I don’t recall”.

[170] Mr. Rizopoulos did not deny making this statement to Mr. Kowal at the July 20th, 2011 meeting, although he did in general refute the proposition that the \$2,500,000 in the Business Plan was a misrepresentation.

[171] I accept Mr. Kowal’s evidence that his understanding of the Business Plan was confirmed by Mr. Rizopoulos during the July 20, 2011 meeting. I put only limited weight on Mr. Rizopoulos’s failure to contradict Mr. Kowal’s evidence because Mr. Rizopoulos was self-

represented and consequently had some difficulties in organizing and presenting his own evidence. He may have simply not appreciated the need to deny the point.

[172] More significant, in my view, is that Mr. Kowal's evidence on this point is directionally consistent with his notes and with the content of the Business Plan. I accept Mr. Kowal's statement that he was less likely to include information in his notes which was contained in the documents provided. For example, unlike Mr. Cutts' notes, Mr. Kowal's notes on the Investor Presentation did not include the "400 bbls/d" information, but rather noted that the well to the north had 475 bbls/d initial production – that is, his notes on that point reflected information not already set out in the document provided. His notes on July 13, 2011 did include some information from the Investor Presentation but did not do so consistently; they were detailed, but not so as to capture everything said.

[173] I also do not see Mr. Kowal's failure to recall this point during questioning as sufficient for me to reject the evidence now. The questions he was asked are not necessarily inconsistent – he has not changed his evidence with respect to Mr. McCormick not telling him verbally about the \$2,500,000 investment. It is understandable that, in responding to a question about whether he had confirmed the \$2,500,000 investment that he might not think to mention that Mr. Rizopoulos had told him about it – since the focus was on the sufficiency of his own diligence, not on what Mr. Rizopoulos had said. Finally, his answer to the question most directly on point (about what Mr. Rizopoulos told him on July 20, 2011) was not a denial, but was merely that, at that time and in response to that question, he did not recall.

[174] In the circumstances, given the documentary record, my overall assessment of Mr. Kowal's testimony, and Mr. Rizopoulos's evidence, the difference between the answers in questioning and the answers given at trial is not sufficient for me to reject the evidence given by Mr. Kowal at trial.

[175] Mr. Cutts did not recall Mr. Kowal telling him about the July 20th meeting. He noted that he would have expected Mr. Kowal's notes of the July 20th meeting to reflect that point. The notes do not do so clearly; Mr. Cutts' comment about what he would expect the notes to have contained does not affect my assessment of the evidence.

[176] During questioning prior to trial, Mr. Cutts said that he knew the founders had 10,000,000 shares prior to investing. At trial, however, he said that he misspoke in giving that answer. He had meant to refer to the fact that the Business Plan sets out 10,000,000 shares as the total shares to be issued for Sun Star, not to say that he knew that the founders had 10,000,000 shares. He did not get counsel to correct the evidence he had given in questioning, but he said he did not appreciate that he should have done so.

[177] I accept Mr. Cutts' trial evidence on this point. His explanation for his confusion seems plausible – that 10,000,000 is both around the number of total shares in the Business Plan and the shares in fact issued to the founders makes confusion between the two concepts understandable. His evidence at trial, that he did not know that the founders had 10,000,000 shares accords with the rest of the documentary evidence, including the Business Plan and Mr. Kowal's notes. In his testimony Mr. Cutts emphasized this point, saying that he does not know why he would have thought the founders had 10,000,000 shares given the documents do not show that and no one had told him that.

[178] I note that during pre-trial questioning, when asked if it was “fair and accurate” to say that he understood “that there existed issued 10 million shares, and that \$2.5 million worth of those shares had been paid for in cash” Mr. Cutts agreed that that was his understanding. As such, his answers in questioning were also not entirely consistent with each other – and this other questioning answer was generally consistent with what he said at trial.

[179] I also observe that in another point where there was an inconsistency with that he had said in questioning (with respect to whether the Defendants had reviewed the “forward looking statements” page in the Investor Presentation) Mr. Cutts said that the statement in the questioning was correct. This shows that Mr. Cutts was not simply taking new positions at trial and disavowing his evidence in questioning but was rather trying to give his best recollection to the Court.

[180] Mr. Clement and Ms. Clement also testified that they had been told by Mr. McCormick when they met with him that the founders had invested \$2,500,000 in cash.

[181] Mr. McCormick denied making this statement. And, in general, he, Mr. Hartland and Mr. Rizopoulos firmly maintained that they did not lie to or mislead the Defendants about their investment or the shares they held. They say that they corrected the error in the Business Plan with respect to the number of shares and made it clear that the founders had not made a cash investment in the company. Mr. McCormick made this point particularly strongly, emphasizing that the Common Share Plaintiffs had been provided the accurate information. As noted, he and Mr. Hartland also denied that the Business Plan was misleading – they did not think a reader would understand “\$2,500,000” to necessarily refer to cash.

[182] I do not accept the evidence of the Defendants on this point and prefer the evidence of the Common Share Plaintiffs. As noted, Mr. Kowal’s notes of July 13, 2011 suggest that the information given to the Defendants was generally consistent with the Business Plan. His notes of July 20, 2011 can be interpreted to support his current testimony.

[183] The inconsistencies with answers given in questioning do not make me disbelieve either Mr. Kowal or Mr. Cutts.

[184] Further, the existence of the Business Plan, and the representations it includes, bolsters the credibility of the evidence given by the Plaintiffs; it seems more plausible that the information given by the Defendants was the same as that contained in the Business Plan than that it contradicted or changed it.

[185] I note also that the Common Share Plaintiffs provide evidence which is directionally consistent – they all noted the information contained in the Business Plan about the founders investment and the shares – but also not identical or duplicative: Mr. Kowal and the Clements said they were explicitly told about the \$2,500,000 investment, but Mr. Cutts did not.

[186] Conversely, as was the case with the 4-32 well, I struggle with the proposition on which the Defendants’ evidence rests. They say that they circulated a Business Plan that contained an acknowledged error about the number of shares issued, and that described sweat equity as “founders invested”, with a number and dollar sign attached. They also say that in person they provided clear and accurate information that “founders invested” meant sweat equity and they had been issued 10,000,000 shares. It seems implausible to me, however, that they carelessly circulated written documents with errors and inaccuracies, but carefully ensured in their verbal

remarks that the correct information was given. The Common Share Plaintiffs' evidence on this point is more plausible and believable.

[187] Mr. McCormick also pointed out the information contained in the Investor Presentation about the Prospective Capital Structure. As discussed earlier, in my view that information was confusing, and not sufficient on its own to correct or clarify the Business Plan. I also do not view it as supporting the Defendants' claim that in their presentations they told the investors that they had not invested \$2,500,000 in cash, and that they had 10,000,000 shares. If anything, the existence of confusing and contradictory information in a second document confirms that the Defendants did not take seriously the need to provide accurate factual information to their prospective investors.

[188] In sum, I find that the Defendants never provided the accurate information about their investment and shares to the investors and that, in fact, Mr. Rizopoulos confirmed the false information to Mr. Kowal, and Mr. McCormick confirmed some of the false information to the Clements.

[189] The Defendants did this despite knowing that they had not invested any cash in Sun Star, and that they had in fact been issued 10,000,000 shares, not 2,593,361.

Director and Officer Pay Structure

[190] Both Mr. Kowal and Mr. Cutts testified that they were led to believe by Mr. McCormick that the officers and directors would be paid based on company performance through the issuance of dividends. Mr. Cutts said he asked about that because the Business Plan indicated \$600,000 of general and administrative expenses which Mr. Cutts viewed as high.

[191] Mr. Cutts' notes of the July 13, 2011 meeting say that the dividends are to be shared equally, and also say "that's how Les and Bob to take their income, no drawing from profit or cash flow".

[192] Mr. Kowal's notes from his July 19, 2011 meeting with Mr. McCormick say executive compensation was "To be determined $\Rightarrow$ Expect to be performance based".

[193] Mr. Kowal testified that executive compensation was important to him, that it was a deal breaker. He testified that Mr. McCormick's information about pay, even though stated "to be determined", led him to understand that this meant that Sun Star would be paid out of dividends because of their shareholdings.

[194] Based on the testimony of Mr. Kowal and Mr. Cutts, and also on Mr. Cutts' notes from July 13, 2011, I accept that Mr. Kowal and Mr. Cutts were told that the payment of the officers and directors would be performance based and would take the form of dividends. I also accept, based on Mr. Kowal's notes, that Mr. McCormick told Mr. Kowal that this matter had not been finally determined.

[195] In his testimony before me, Mr. McCormick said that the plan of the Defendants was to take a salary once the company had significant farm-out or drilling success and it looked like they were in a position to afford to take a salary. He said that it was never the plan of the Defendants to take their pay only through dividends, although as significant shareholders it would have been to their benefit were dividends to be paid. He suggested that this is the point that he had been making to Mr. Kowal and Mr. Cutts.

[196] Mr. Hartland and Mr. Rizopoulos similarly testified that they decided to pay themselves because they had raised money from investors and received the deposit from Western. They thought they deserved pay for the work they put in.

[197] At the time the statements to Mr. Kowal and Mr. Cutts about pay were made they were not specifically false; the Defendants had not yet taken any salary, and the information given to Mr. Kowal on July 19, 2011 was explicit in saying that this issue was “to be determined”.

[198] I also, though, find what the Defendants said on this point, particularly in the July 13, 2011 meeting, was misleading. Mr. McCormick may have later qualified the representation that they would be paid through dividends by saying that no final decision had been made; however, even then Mr. McCormick suggested that their pay would be performance based which, in the context of their earlier remarks, Mr. Kowal understood to mean that they would be paid through dividends. The point the Defendants had made at the beginning, as reflected in Mr. Cutts’ notes, was that they said that there would be no draw from profit or cash flow; saying it was “to be determined” qualified that message but did not change its substance.

[199] Yet not taking a draw from profit or cash flow was never what the Defendants intended. I accept Mr. McCormick’s evidence that the Defendants always planned to pay themselves a salary once they had the revenue to do so; that they paid themselves a salary so quickly after the common share sale confirms that that was their intention even prior to the common share sale. Their statements to Mr. Kowal and Mr. Cutts suggesting that the pay would be through dividends and not taken from profit or cash flow created a misleading impression, and one that the Defendants knew would be misleading.

Due diligence

[200] The Common Share Plaintiffs did little independent research or due diligence in relation to the Sun Star investment. Mr. Kowal and Mr. Cutts together or on their own talked to one or more of Mr. Hartland, Mr. McCormick and Mr. Rizopoulos a number of times prior to purchasing their shares. They reviewed the materials they were given. Mr. and Ms. Clement met with Mr. McCormick and Mr. Rizopoulos.

[201] They did not, however, ask for legible copies of the slides on the Investor Presentation in relation to the 4-32 well. They did not seek out production data with respect to the 4-32 well from other sources.

[202] They did not confirm that the founders had invested \$2,500,000 or ask what the founders had paid for their shares. They did not ask for clarification of the pages in the Investor Presentation labelled “Prospective Capital Structure” or “Prospective Company NAV”, or for an explanation of how those slides could be reconciled with the information in the Business Plan.

[203] They did not ask Sun Star for banking information, the share register or financial statements. They did not ask to speak to Sun Star’s legal counsel. They did not verify the truth of any of the claims made by Sun Star. They say that they did not ask for any additional information because they were satisfied with the information they were given.

[204] Mr. Kowal and Mr. Cutts did do some due diligence on Mr. Rizopoulos personally; they asked him for references and contacted them. Nothing in that process raised any cause for concern. Mr. Cutts indicated that everyone they contacted was positive about Mr. Rizopoulos.

[205] Mr. Kowal also shared the information with a business acquaintance, who described it as aggressive but doable with new technology.

[206] Fundamentally, however, all of the Common Share Plaintiffs simply accepted the accuracy of the information they were given. In particular, they believed that the proposed 13-29 well was low risk. They believed the 4-32 analogue well was producing 400 bbls/day. They believed that the founders had invested \$2,500,000 of their own money and had received 2,593,361 shares. Mr. Kowal and Mr. Cutts believed that the Defendants would not be taking a salary. The Common Share Plaintiffs believed what they were told and did not make much effort to confirm its veracity.

Information Relied on by Common Share Plaintiffs

[207] Mr. Kowal and Mr. Cutts say they relied on the incorrect or false information given by the Defendants in deciding to purchase the common shares. In particular, they relied on the 13-29 well being low risk. They relied on the analogue 4-32 well having ongoing production of 400 bbls/d, which indicated that the 13-29 well was likely to be productive as well as low risk. They relied on the Defendants having invested \$2,500,000 in cash and having been issued 2,593,361 shares. They relied on the Defendants being paid through dividends, not cash.

[208] Similarly, the Clements say they relied on the 4-32 analogue well having production of 400 bbls/d. They relied on the Defendants having invested \$2,500,000 of their own money.

[209] Ms. Kowal and Ms. Cutts say they relied on their husbands' advice and direction in making the decision.

[210] The Defendants submit that the Common Share Plaintiffs have not accurately described the reasons for their decision to invest. They emphasize in particular that Mr. Kowal and Mr. Clement had had successful investments with Condo-Condo and Mr. Hartland and Mr. McCormick in the past. They say that the decision to invest was based on trust and confidence in the Defendants, and in particular in Mr. Hartland and Mr. McCormick. They say that who Mr. Hartland and Mr. McCormick were was important, not what they said.

[211] The Defendants also suggest that the Common Share Plaintiffs were more influenced by the longer-term higher risk/higher reward plays and in particular the Montney property in making their investment.

[212] I accept the Common Share Plaintiffs' evidence on this point. The contemporaneous record supports their evidence, particularly with respect to the 4-32 well; Mr. Kowal and Mr. Cutts' notes include detailed information about that well, and it was highlighted in the Investor Presentation.

[213] Further, it makes sense that the Common Share Plaintiffs would have been induced by the 4-32 well and the founders' investment to make their investment in the common shares. An analogue well 200 metres away producing 400 bbls/d provides considerable reassurance that drilling the 13-29 well was low risk and had a meaningful probability of producing good rewards. The founders having invested \$2,500,000 not only shows the founders had put their own resources at stake; it also suggests that the company had either paid out significant funds to acquire their assets or had a good financial cushion to allow them to develop those assets.

[214] In addition, the difference between purchasing shares in a company where founders already have 10,000,000 shares for which they paid nothing, and a company where the founders

have 2,593,361 shares which they acquired on a similar basis to what the investors were being offered, is highly material, and would logically influence an investors' decision to invest. Mr. Cutts described himself as "flabbergasted" when he discovered the truth and emphasized the difference between the nature of the investment in a company where the founders have 2,593,361 shares and one where they have 10,000,000. He said that he could not believe that anyone could make a presentation to investors and not disclose this information. His surprise on this point is reasonable and reflects the reliance he placed on the share information set out in the Business Plan.

[215] I am less confident that the Common Share Plaintiffs relied on the information about how the Defendants would be paid. Mr. Kowal was told that this issue was to be determined, which means he did not have concrete information on which it would be reasonable to rely. The documents that they were provided do not show the Defendants being paid entirely through dividends, and in fact list a relatively large number for general and administrative expenses. It also is not reasonable to expect that people working as officers of a company will do so without financial compensation except through their shareholdings, especially since the Common Share Plaintiffs believed those shareholdings to be much smaller than they actually were. I know Mr. Cutts and Mr. Kowal said this information was very important to them, and I accept that it was important, but I do not think it induced their decision to invest in the way that the other information did. It does not speak as directly or centrally to the financial viability and opportunity available to Sun Star as does the 4-32 well or the founders' investment.

[216] I agree that the Common Share Plaintiffs were influenced by their trust and confidence in Mr. Hartland and Mr. McCormick. That trust and confidence led them to believe what they were told, and not to feel they needed to check or verify that information. I do not, however, think that that trust and confidence means they ignored the facts with which they were provided. This was not an abstract investment – 'here's some money, go do something good with it' – it was a specific investment in a specific opportunity explained to them by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos. The Plaintiffs said they relied on that explanation, and on the information they were given about the 4-32 well and the founders' investment, in deciding to purchase the common shares. It makes sense that they would have done so, and I believe their evidence in this respect.

[217] I also note, as they did in their testimony, that the Common Share Plaintiffs knew that there were risks associated with this investment. They did not view it as a sure thing. They could not reasonably have done so. The question was as to the nature and extent of the risk they thought they were taking, and in assessing that – and in deciding to invest – they relied on what they were told by the Defendants and saw in the documents about the 4-32 well, the founders' \$2,500,000 investment and the founders' shares.

Purchase of the Common Shares

[218] On July 7, 2011 Marc and Teri-Lynn Clement purchased 50,000 shares at \$1 per share for a total cost of \$50,000.

[219] On July 25, 2011 Mr. and Ms. Kowal and Eagle Tree each agreed to purchase 100,000 common shares in Sun Star for a total cost of \$300,000.

[220] In late July and mid-August, in two transactions, Mr. and Ms. Cutts each purchased 60,000 common shares in Sun Star for a total cost of \$120,000.

[221] In addition, in July or August 2011, Mr. Kevin Orriss purchased 10,000 shares for \$10,000.

Subscription Agreement

[222] Each of the Common Share Plaintiffs entered into a Subscription Agreement with Sun Star.

[223] The Subscription Agreement included an acknowledgement of risk, and a representation as to the subscriber's sophistication, knowledge and risk capacity. It also included representations by the subscriber that they understood that no regulatory body, including a securities commission, had given an opinion with respect to the merits of investing the common shares, and that no prospectus had been filed. It made the subscriber responsible for obtaining "such legal advice as it considers appropriate".

[224] The Agreement provided that the subscriber accepted that no representations had been made about the future value of the shares, and that they had relied only on publicly available information and not on "verbal or written representation as to fact or otherwise made on behalf of the Corporation". It further provided that the subscribers agreed to indemnify the corporation for losses arising from Sun Star's reliance on their representations.

[225] The Subscription Agreement contained an entire agreement clause, which stated that "there are no representations, covenants or other agreements relating to the subject matter hereof except as stated or referred to herein".

[226] All of the Common Share Plaintiffs acknowledged that this was a binding legal agreement; some had paid more attention to the terms than others. Mr. Kowal and Mr. Cutts had reviewed the Agreement and had some understanding of its terms, whereas Ms. Kowal and Ms. Cutts relied on their husbands and did not themselves review it. The Clements had a lawyer provide them with an opinion on the Agreement prior to signing it.

Kevin Orriss

[227] As noted, Mr. Orriss purchased 10,000 common shares. Mr. Orriss is suffering from terminal cancer and was unable to testify before me.

[228] Evidence presented at trial provided some information about his participation in the common share purchase, which largely occurred through Mr. Cutts.

[229] On July 13, 2011 Mr. Cutts sent an e-mail to Mr. McCormick saying that he was "Looking forward to investing" and that he had passed on information to his wife's cousin, Mr. Orriss, "who has been a land man for a number of start up's and operating companies over the last 30 years in Alberta".

[230] On that same day, Mr. Cutts sent Mr. Orriss an e-mail attaching the Investor Presentation and the Business Plan. The e-mail said:

The attached looks and sounds pretty good, (I was at a presentation this am) my friend who introduced me to these folks has invested in a real estate deal with the Pres and Sec and says they are good honest people. The key of course is the oil and gas guys and the three leases they have acquired. Yu will no doubt know the area's [sic] they are involved in.

They are raising 1.5 million and have commitments for 500K to date and want to close the other million in 10 days – I’m interested and will more than likely get Neil Devitt and my son Daniel to take a look as well. However, would not move forward if you put up any red flags.

Daniel, can you have your Calgary office look at this – would they have insight on this size an investment opportunity? I will call you later today.

The folks are talking a 10 times return in three years – “from their lips to gods ear”!!!!

They are set to start drilling on the Elmworth Charlie Lakes property by August 1st and have a major that will start drilling on their one section sight in the Montney Oil Play Zone within the next 10 to 15 days – so the window to invest is fairly small because they will not be offering this investment at a \$1.00 pre [sic] share if either of these wells show positive results.

[231] Mr. Cutts further testified that he told Mr. Orriss about the 400 bbls/ day production from the 4-32 well, about the founders having invested \$2,500,000, and the total shares being 10,000,000.

[232] Mr. Cutts said that Mr. Orriss was very busy, and it was not clear to Mr. Cutts how much time Mr. Orriss spent on the investment decision.

[233] Based on this evidence I am satisfied that Mr. Orriss received the Business Plan and Investor Presentation. I do not, however, have evidence about whether he reviewed those materials, or relied upon them.

[234] I have less confidence in Mr. Cutts’ evidence about what he told Mr. Orriss than in the remainder of his evidence. This is not because I think Mr. Cutts was not honest. However, the evidence here is not supported by contemporaneous documentation. I also think it less likely that Mr. Cutts recalls clearly what he said to someone else, as opposed to Mr. Orriss remembering what was said to him about the investment he was going to make. That is, I think Mr. Orriss would provide more reliable evidence about what Mr. Cutts said to him, than would Mr. Cutts about what he said, simply because of the nature of the evidence in question. I assess below whether, in the absence of confirmatory testimony by Mr. Orriss, Mr. Cutts’ evidence (along with the e-mail) is sufficient to discharge Mr. Orriss’s burden of proof with respect to his fraudulent misrepresentation claim.

Sale of the Flow-Through Shares: November-December 2011

Background

[235] As noted, Sun Star had an agreement for the 13-29 Well to be drilled by Western. Unfortunately, Western backed out of the agreement. It forfeited its deposit, and Sun Star decided to drill the 13-29 well itself.

[236] Sun Star spud the 13-29 well on October 16, 2011. By November 2011 Sun Star had started to receive some preliminary information on the 13-29 well; the drill was completed on November 19, 2011.

[237] The Defendants decided to finance the drill of the 13-29 well through selling flow-through shares. They solicited purchasers of flow-through shares in November and December, 2011.

[238] All of the Plaintiffs, except the Clements and Eagle Tree, purchased flow-through shares, specifically, Mr. Kowal and Ms. Kowal, Mr. Cutts and Ms. Cutts, Mr. Neil Devitt, Mr. Don Devitt, Mr. Lerry Hubbs, Mr. Robert Knoll and Ms. Mei Choon Knoll (collectively, the “Flow-Through Plaintiffs”).

[239] While I discuss the evidence related to the other Flow-Through Plaintiffs in the sections that follow, I note here that Ms. Knoll invested based on the advice and direction of Mr. Knoll; she did not testify at the trial, but Mr. Knoll confirmed that she simply relied on his judgment to make the investment, and did not participate in the process of deciding whether to buy the shares. He did not explain the investment to his wife to any great extent.

[240] Mr. Orriss also purchased flow-through shares; again, evidence related to his purchase will be discussed in a separate section, and I do not include him in the category Flow-Through Plaintiffs.

Documents Provided by Sun Star

[241] Sun Star did not prepare any new documents to provide to prospective investors in the flow-through shares.

[242] Mr. Kowal and Mr. Cutts still had the Investor Presentation, Business Plan and Introductory E-mail they had been given prior to purchasing the common shares.

[243] Mr. Cutts shared the Investor Presentation and Business Plan with Mr. Don Devitt, although Mr. Don Devitt did not review them.

[244] Mr. Neil Devitt could not recall whether he received the Investor Presentation and the Business Plan.

[245] Mr. Hubbs and Mr. Knoll were shown the Investor Presentation by Mr. McCormick, including the slides related to the 4-32 well. Mr. McCormick and Mr. Knoll testified that Mr. McCormick reviewed the Investor Presentation; both Mr. McCormick and Mr. Knoll said that Mr. Hubbs was there. Mr. Hubbs did not mention Mr. McCormick’s review of the Investor Presentation, but I am satisfied that it happened and that he was there.

[246] Mr. Hubbs may have been given a copy of the Business Plan, but he was not certain and, in any event, did not review it.

[247] Mr. Knoll could not recall seeing the Business Plan.

Information Provided by Sun Star

Position of the Parties

[248] The Flow-Through Plaintiffs who spoke with the Defendants – namely Mr. Kowal, Mr. Cutts, Mr. Hubbs and Mr. Knoll – all testified to having been given information in relation to five key points: first, the Defendants’ personal investment in Sun Star; second, the positive initial results from drilling the 13-29 well; third, the production from the 4-32 well; fourth, how the Defendants would be paid; and, fifth, the availability of tax deductions for the flow-through shares.

[249] Ms. Kowal could not recall what additional information, if any, Mr. Kowal gave to her prior to purchasing the flow-through shares. Ms. Kowal testified that she did not recall why Mr. Kowal thought it was a good idea to purchase the flow-through shares. She simply relied on her husband's advice and direction in deciding to do so.

[250] Similarly, Ms. Cutts did not have any recollection about what information, if any, Mr. Cutts provided to her prior to purchasing the flow-through shares.

[251] Mr. Don Devitt testified that Mr. Cutts told him that the well adjacent to the 13-29 well was producing 400 bbls/d, and that this had been verified by scouts. He also said that Mr. Cutts told him that the founders had invested \$2,500,000 in the company. Finally, Mr. Don Devitt said Mr. Cutts told him that the 13-29 well was doing very well, looking very positive and should definitely produce oil. Mr. Don Devitt did not mention in his testimony being given information about how the Defendants were to be paid.

[252] Mr. Neil Devitt also testified that he knew from what Mr. Cutts told him that the well adjacent to the 13-29 well was producing 400 bbls/d, and that the founders had invested \$2,500,000 in the company. He was told by Mr. Cutts that the Defendants were not going to be paid until others were receiving their dividends. Finally, he was also told by Mr. Cutts that the 13-29 well was doing very well, and that they expected it would produce at 400 bbls/d or higher. He said though that at the time he purchased his flow-through shares he did not yet know whether it had produced oil or not.

[253] Mr. McCormick and Mr. Rizopoulos testified that they only provided accurate information about the production from the 4-32 and 13-29 wells. Mr. McCormick denied telling any of the Flow-Through Plaintiffs that they had invested \$2,500,000 in the company or that they would only be paid in dividends.

[254] Mr. Hartland testified that he never met with the Flow-Through Plaintiffs and did not give them any information. The Flow-Through Plaintiffs acknowledged that they did not meet with Mr. Hartland.

The Founders Investment and Sun Star Share Structure

[255] As described previously, Mr. Kowal and Mr. Cutts were given information about the founders' investment of \$2,500,000 during the common share investment process. They were given this information through the Business Plan and, in the case of Mr. Kowal, in a meeting with Mr. Rizopoulos. This information was not clarified or corrected by the Defendants during the flow-through share meetings. Mr. Kowal and Mr. Cutts continued to believe that the founders had invested \$2,500,000 in Sun Star at the time of the flow-through share purchase, and still did not know that the founders had 10,000,000 shares.

[256] I note in support of Mr. Kowal and Mr. Cutts' testimony on this issue that, on November 30, 2011, Mr. Kowal met with Mr. Hartland and Mr. McCormick. Mr. Kowal's notes of the meeting say

- Shares
- 9 m
- + 1 @ \$1
- + 1 Flow Thru @ \$1

Mr. Kowal testified that he understood these notes to be consistent with the share information provided in the Business Plan. This evidence is plausible. The decision to issue these flow-through shares would have been made after the Business Plan was created; Western did not withdraw from participating in drilling the 13-29 well until after the common share purchases, and it was not until Western withdrew that issuing the flow-through shares became necessary. The notes thus plausibly identify the 10,000,000 diluted shares in the Business Plan with the addition of a proposed 1,000,000 in flow-through shares.

[257] By contrast, these notes do not support the evidence of the Defendants that they explicitly told the Plaintiffs that they had been issued 10,000,000 shares at no cost. They are *prima facie* inconsistent with that claim.

[258] The meeting described in these notes occurred after Mr. Kowal had purchased the flow-through shares and, as such, cannot be used directly to show that the Defendants provided false information relied on by Mr. Kowal to purchase those shares. However, the notes generally support the credibility of the Plaintiffs' testimony that the Defendants did not tell them about the shares they actually had.

[259] Mr. McCormick suggested in his testimony that Mr. Kowal's notes were incorrect. I do not see why Mr. Kowal's notes would not have accurately recorded what he was told, particularly given the rest of the evidence on this issue. I do not accept Mr. McCormick's suggestion.

[260] Mr. Cutts said he gave the information about the founders' investment to Mr. Don Devitt and Mr. Neil Devitt. Mr. Neil Devitt and Mr. Don Devitt said that Mr. Cutts told them about the founders' investment.

[261] I accept that Mr. Cutts told Mr. Don Devitt and Mr. Neil Devitt about the founders' investment. As I explained above with respect to the information relied upon by the Common Share Plaintiffs, the \$2,500,000 founders' investment suggested that Sun Star had a financial stability that mitigated the risks associated with its well development, and also that the founders had a significant personal stake in their company. It was important and reassuring information. I find it plausible that Mr. Cutts would have told Mr. Neil Devitt and Mr. Don Devitt about it in describing the nature of the Sun Star opportunity and the associated risk.

[262] Mr. Hubbs recalled specifically being told by Mr. McCormick that Mr. Hartland and Mr. McCormick had each invested \$1,250,000 in cash in Sun Star, and that Mr. Rizopoulos had contributed \$1,400,000 in land. Mr. McCormick was staying at Mr. Hubbs' home in Phoenix in November 2011. Mr. Hubbs testified that he felt grateful because he was being given the opportunity to buy shares for \$1 per share, the same price as the other investors, even though the well had actually been drilled. Mr. Hubbs said that Mr. McCormick told him that this opportunity was to make-up for some bad advice Mr. McCormick had given him years ago. Mr. Hubbs said that he knew that normally Mr. McCormick did not put his own funds in projects in which he was involved, and that Mr. Hubbs did not want to invest where Mr. McCormick was simply using other people's money in his business ventures. That the founders had themselves invested made Sun Star different.

[263] Mr. Knoll said that he asked Mr. McCormick about whether they had "skin in the game". He asked Mr. McCormick this at the presentation Mr. McCormick gave to Mr. Knoll and Mr. Hubbs. Mr. Knoll said that Mr. McCormick told him that they had skin in the game. Mr. Knoll

said further that Mr. McCormick told him then, or later in Calgary, that the founders had invested \$2,500,000 in the company. Mr. Knoll did not recall Mr. McCormick saying how much each of the Defendants had contributed to the \$2,500,000. Mr. Knoll also said that this was important to him – that the Defendants were risking their assets, and not just the investors’.

[264] In his final day of questioning prior to the trial, Mr. Knoll said that he did not recall Mr. McCormick saying that the founders had invested money. Mr. Knoll explained this difference from his trial evidence as arising from his illness on the last day of questioning.

[265] Having reviewed the transcript excerpts from the final day of questioning, comparing it to the excerpts from other days of questioning with which I was provided, and listening to Mr. Knoll’s testimony at trial, I observe that his testimony on that final day of questioning is atypical of the evidence he otherwise provided. Further, I note that during questioning on that final day his answers were variable – as well as saying that he did not recall being told about the founders’ investment, he also said that the Defendants had “lied about drilling a well next to a producing well and about putting money into the company”.

[266] Mr. McCormick denied saying to Mr. Hubbs and Mr. Knoll that the Defendants had made a cash investment in Sun Star.

[267] In resolving this conflict in the evidence, I do not have the benefit of contemporaneous documentation about what Mr. Hubbs and Mr. Knoll were told. The correspondence Mr. Hubbs sent to the Defendants in April 2012 expressing his frustration with how events had turned out did not mention the founders’ investment. That gap does not especially favour the Defendants, however, since Mr. Hubbs would not have known in April, 2012 that the founders had not invested any money; however, it does mean that there is no contemporaneous or near contemporaneous evidence to corroborate his and Mr. Knoll’s account. I also note that Mr. Hubbs did not mention this issue in his correspondence to the Defendants in 2013, at which point he was more likely to have known that the founders had not invested cash.

[268] Despite the lack of corroborating contemporaneous evidence, and the deviation from Mr. Knoll’s answers in his final day of questioning, I prefer the evidence of Mr. Hubbs and Mr. Knoll to that of Mr. McCormick.

[269] Mr. Hubbs had a specific recollection of Mr. McCormick telling him about the founders’ investment, and he also told his story with emotion that lent it authenticity. The clear impression I had from Mr. Hubbs’ testimony was that he felt hurt and betrayed that an old friend – someone staying in his house! – had told him a lie. That personal betrayal seemed to be as much of a concern to Mr. Hubbs as was the loss of his investment. That emotion, along with the specificity of his recollection, made me think that Mr. Hubbs was telling the truth. I also think it significant that Mr. Hubbs had declined to invest with Mr. McCormick in other ventures because Mr. McCormick did not have a personal stake in the venture. I believe Mr. Hubbs on that point (and note that the Defendants do not challenge his evidence that he had not made such an investment) and thus also accept that Mr. McCormick saying he had a significant stake in Sun Star would have been both important to Mr. Hubbs and the kind of thing Mr. Hubbs would remember. Nothing in what he said, or in the way he said it, gave me reason to think Mr. Hubbs untruthful.

[270] Similarly, while Mr. Knoll had no contemporaneous records in relation to what he was told, I find it plausible that the founders’ investment would have been important to him, and the kind of thing that he would remember having been told. I also do not think the difference from

questioning is significant. I accept that Mr. Knoll was not well on the final day of questioning and that his answers that day are atypical and less reliable than his evidence given at trial. I also note that even on that day Mr. Knoll said that the Defendants had lied to him about their investment, which was consistent with his trial evidence.

[271] Further, even if it was not relied on with Mr. Knoll and Mr. Hubbs to the same extent as it was with the Common Share Plaintiffs, the fact that the Business Plan said what it did shows that the Defendants pitched the investment by claiming to have made a significant personal investment, and I see no reason to think that they would have changed their approach when promoting the flow-through shares.

[272] In addition, my significant doubts about the plausibility of Mr. McCormick's evidence in other respects, as previously discussed, undermines his credibility generally, and supports my preference for the evidence of Mr. Hubbs and Mr. Knoll on this point of conflict.

[273] As earlier discussed, Mr. McCormick (and the other Defendants) knew that they had not invested \$2,500,000

The 13-29 Well

[274] With respect to the 13-29 well, Mr. Kowal and Mr. Cutts were given numerous updates and predictions through meetings and e-mails in November 2011. For the most part this information was positive, suggesting variously that Sun Star had found oil, that there did not appear to be significant amounts of gas or water, and forecasting production of anywhere from 100-1000 bbls/day, depending on the type of drilling used over the longer term.

[275] On November 8, 2011 Mr. Kowal sent an e-mail to Mr. Cutts summarizing a meeting he had with Mr. McCormick. Mr. McCormick, on being provided with a copy of this e-mail at the time, replied to Mr. Kowal and Mr. Cutts saying that it captured the conversation "well". Mr. Kowal's e-mail said that Mr. McCormick described the 13-29 well as "the best play in the package" and that drilling was underway. The e-mail said that Mr. McCormick described the 13-29 well as a "development" not "exploration" play.

[276] On November 13, 2011 Mr. McCormick forwarded an e-mail to Mr. Kowal and Mr. Cutts which said that they had "oil on the shaker". That same day he forwarded another e-mail which identified that they had had to withdraw from the hole to avoid getting tools stuck. Another e-mail in the same thread said "Great news significant porosity!!!!" It described the overall situation as "Very positive news". Mr. McCormick also forwarded an e-mail from Mr. Rizopoulos saying "We have officially hit the Zone, Roger and I collectively made a decision to case the well since we have had strong oil shows and gas, this is great news guys". The thread also included an e-mail saying "there were excellent oil shows over the shaker and bubbling gas in the mud".

[277] In notes dated November 14, 2011, of a meeting with Mr. Rizopoulos and Mr. McCormick, Mr. Kowal reports being told that they had achieved the "Best possible result" and that the pool might result in 20,000,000 barrels of oil. The notes say that the well will produce "Conservative 200-300 bpd" and "Optimistic 500+".

[278] Notes made by Mr. Cutts of a meeting, which are not dated but which Mr. Cutts said were from a meeting with Mr. Rizopoulos from the time when they made the flow-through share investment, say projected production is "800 to 1000 bpd. Fracking within days". The notes

indicate the availability of 1,000,000 flow-through shares, and that they had sold 125,000; this supports Mr. Cutts testimony that the notes predate the flow-through share purchase.

[279] Mr. Kowal's November 18, 2011 notes of a conversation with Mr. Rizopoulos say, "Elmworth 150 bbl/day w/o frac w/o horizontal drill". Mr. Kowal's earlier notes, dated November 15, 2011, of a conversation with Mr. Rizopoulos say (punctuation added) "Elmworth: Oil only; Gas w liquids not in numbers – No Gas; No NGL - * Very conservative numbers * » 2011 YE numbers as a minimum".

[280] Mr. Kowal also spoke about the 13-29 well to Mr. Roger Hume, who was working with the Defendants on the drill. Mr. Kowal's notes say that Mr. Hume told Mr. Kowal that the well was cased-off, that it was in the "Most favourable position", that the long-term potential of the well was 100 bbls/d, and that it had 200,000 plus barrel potential over the life of the well.

[281] Notes dated November 21, 2011 of a discussion between Mr. Rizopoulos and Mr. Kowal, say that the production estimate was in the range of "150-250 bbl/d with no stimulation. Conservative". The notes suggest that fracking would increase production two and a half to three times. They say that it is estimated that there were 20,000,000 to 25,000,000 barrels in the pool.

[282] In an e-mail dated November 26, 2011, Mr. Rizopoulos told Mr. Kowal with respect to the 13-29 well that all "looks very good" and said, "Stay tuned".

[283] In notes dated November 29, 2011 of a phone call with Mr. McCormick, Mr. Kowal recorded being told that the 13-29 well had "IP 250 BPD" and that with acid wash the initial production might increase by "50 BPD". The notes are contained in Mr. Kowal's "Action" list for that date, noting "Msge 8:50 am Bob McCormick re Funds for Manyberries". Then underneath it lists the information about Elmworth 1. Mr. Kowal confirmed in his testimony that this recorded a conversation with Mr. McCormick. This phone call occurred after Mr. Kowal purchased the flow-through shares.

[284] Mr. McCormick testified that he did not recall saying this to Mr. Kowal.

[285] On December 4, 2011, following his purchase of the flow-through shares, Mr. Kowal sent a congratulatory e-mail to Mr. Hartland, Mr. McCormick and Mr. Rizopoulos saying:

Hi Bob, Les and Sandy

I wanted to send a brief note with a few comments about Sun Star Energy.

As we look back on the past few weeks, November has been a month to remember.

...the excitement of the drill at Elmworth 1 and the confirmation last week of 250 BPD before an acid wash and without fracing

....Positive feedback from Galleon regarding potential additional wells on Section 21

....The potential of an Elmworth 2 well, and looking forward to Manyberries, as well as the 9,000 acre "wildcard" lease (My terminology)

....The successful issue of a million flow through shares.

Lots to feel good about!

My congratulations and thanks to the Sun Star Management Team.

We appreciate the knowledge and experience that you bring to the business, as well as your transparency and open communication as we move forward.

We look forward to many more Sun Star Energy success stories.

Thanks again,

Dave

[286] Mr. Kowal testified that this e-mail reflected his knowledge in December 2011 regarding the Defendants' projections for the 13-29 well based on their professional opinions. He said that by sending the e-mail he was confirming their open communications and transparency, along with his understanding that the 13-29 well had been confirmed to produce 250 bbls/d.

[287] Mr. Kowal and Mr. Cutts were sent some information indicating challenges that had been encountered in terms of the drilling performance and speed, including some daily drilling reports. The overall message, however, based on their notes and e-mails from the time, as well as their testimony, suggest that Mr. Kowal and Mr. Cutts were told by the Defendants that the initial drilling of the 13-29 well showed very positive signs, was likely to produce a significant amount of oil per day and, to use the words of Mr. McCormick, could be considered a development well not an exploration well. Mr. Kowal was specifically told its initial production was 250 bbls/d, although not until after he had purchased the flow-through shares.

[288] Mr. Neil Devitt recalls being told by Mr. Cutts that the 13-29 well was in the process of being drilled, that they'd had very positive results, and were expecting production of about 400 bbls/day. He was given especially positive information about the 13-29 well prior to making his second investment in the flow-through shares; he understood that Sun Star had had positive results from its initial drilling. Mr. Cutts confirmed that he had provided this information to Mr. Neil Devitt.

[289] Mr. Donald Devitt said that he too had been told by Mr. Cutts that the 13-29 well was doing very well and was about to be finished. He did not remember if he received actual numbers but does remember being told that it was very positive, that everything looked good and that they should definitely get oil from it. Mr. Cutts confirmed that he had provided this information to Mr. Don Devitt.

[290] Mr. Hubbs testified that Mr. McCormick told him that Sun Star had successfully drilled the 13-29 well and that there were shows of oil. Mr. McCormick was staying with Mr. Hubbs in Phoenix at the time the 13-29 well was being drilled, and was receiving regular updates on the drilling, which he showed to Mr. Hubbs. At some point Mr. McCormick told Mr. Hubbs that the tip had touched oil, and there was a great deal of pressure showing that it would be a winner.

[291] Mr. Knoll was somewhat inconsistent with respect to his recollection on the 13-29 well, saying at first that he thought that it had not yet been drilled but then acknowledging under cross-examination that he was aware prior to his investment that the 13-29 well had been cased, drilled and that there was oil with good pressure.

[292] Mr. McCormick and Mr. Rizopoulos did not dispute that they had provided this information about the 13-29 well to the Flow-Through Plaintiffs. They maintained that what they said to the Flow-Through Plaintiffs reflected their own knowledge at that time. They emphasized that the Flow-Through Plaintiffs knew that the 13-29 well was not complete and on-production at

that time, and that the information the Defendants provided was only a forecast based on the preliminary results Sun Star was obtaining.

[293] The documents do show, however, that as of November 30, 2011 Mr. Rizopoulos advised Mr. Hartland and Mr. McCormick by e-mail that the well was producing 149 bbls/d. On December 1, 2011 the Defendants were given information in an e-mail from Mr. Soares showing that the 13-29 well had produced 65 bbls/day over a 24-hour period. Further, in an e-mail dated December 5, 2011 Mr. Rizopoulos advised Mr. Hartland and Mr. McCormick, along with representatives of Tiger Moth, that the 13-29 well “may see a stabilized rate of somewhere between 35 and 50 bbls/d.” On December 6, 2011, after receiving the updated 4-32 well results, Mr. Rizopoulos said to Mr. Hartland “We just spent 2.2 million for a 30 to 40 bbl/d oil well”. In an e-mail dated December 10, 2011 Mr. Soares advised a number of persons, including the Defendants, that “the 13-29 flowed 24mc/d (150 bbls/d) to less than 10 m3/d (63 bbls/d)”.

[294] This information was available to the Defendants prior to Mr. Knoll and Mr. Hubbs investing in the flow-through shares, but the Defendants did not provide that information to Mr. Knoll and Mr. Hubbs.

[295] The evidence before me does not show that either Mr. Knoll or Mr. Hubbs were provided specifically false information with respect to the 13-29 well’s initial performance or projections. It does, however, suggest that the Defendants did not tell Mr. Knoll or Mr. Hubbs the actual information they had with respect to the 13-29 well by early December 2011, and the extent to which it suggested that the production from the 13-29 well was not at the high levels the Defendants had initially hoped, or consistent with the claims they made about production from the 4-32 well, as discussed below.

[296] The evidence shows that Mr. Kowal and Mr. Cutts were provided with projections of the 13-29 well that could not reasonably be supported by the information known to the Defendants in November 2011. Those projections gave Mr. Kowal and Mr. Cutts a misplaced sense of security with respect to their investment and the risk associated with the flow-through share investment. Mr. Cutts shared this unduly optimistic information with Mr. Neil Devitt and Mr. Don Devitt.

[297] The evidence also shows, however, that Mr. Kowal and Mr. Cutts knew and were told that many of these numbers were projections; it also shows that they were given some accurate information about the progress of the 13-29 well. Further, by the time the Defendants knew that the 13-29 well was performing below expectations, the Kowals, the Cutts and Mr. Neil Devitt and Mr. Don Devitt had already purchased their flow-through shares. It is not clear based on the evidence before me that the Defendants themselves appreciated prior to December 1, 2011 that the 13-29 well was going to produce oil only to a mediocre extent.

[298] Having said that, the evidence does not show any foundation for the projections given by Mr. Rizopoulos and Mr. McCormick for the future production of the well. My inference from the evidence is that in providing this information Mr. Rizopoulos and Mr. McCormick wanted to reinforce the desirability of the flow-through investment to Mr. Kowal and Mr. Cutts and were unconcerned with whether the information was true or not.

The 4-32 Well

[299] With respect to the 4-32 well, Mr. Kowal testified, and his notes confirm, that in the meeting on November 14, 2011 Mr. McCormick and Mr. Rizopoulos told Mr. Kowal that the

next door well (that is, the 4-32) was currently producing 250-350 bbls/day, and that that had been verified by scouts counting three trucks a day leaving the well site.

[300] Mr. Cutts did not recall being told anything about the 4-32 well during the meetings regarding the flow-through shares. His only information was what he had earlier been told about the 4-32 well, namely, that it had produced on average 400 bbls/day and that this had been confirmed by scouts. Mr. Neil Devitt said that he was given this information by Mr. Cutts, as did Mr. Donald Devitt. Mr. Cutts confirmed that he provided them with this information.

[301] Mr. Hubbs was told that the 4-32 was producing 285 bbls/day, and that this had been confirmed by a scout – someone with an ATV who camped out and counted the trucks being carried from the adjacent well. He testified to being given this information by Mr. McCormick. In addition, in his April 2012 e-mail to Mr. McCormick and Mr. Hartland, Mr. Hubbs said that this is what Mr. McCormick had told him prior to his investment in the flow-through shares:

You and I spent 10 days in Phoenix in November and all I heard from you was “great news”, “outstanding investment opportunity” “great Engineer with 30 years’ experience working in the Oilfield” “a report from some dude who ‘camped-out’ at your well-site for several days reporting that an adjacent well was reporting 285 BOED and that your well should come in at around the same flow rate”.

[302] Mr. McCormick testified that Mr. Hubbs’ e-mail of April 2012 was incorrect; however, I prefer the documentary evidence of Mr. Hubbs’ near contemporaneous e-mail to Mr. McCormick’s current denial. I see no basis in the evidence for concluding that Mr. Hubbs’ e-mail from that time would be inaccurate.

[303] Mr. Knoll said that he was told that the 4-32 well had averaged 400 bbls/d in its initial production over its first three months. This was also what he had derived from looking at the Investor Presentation. He observed that 400 bbls/d of production over three months is a “hell of a good well”, and that these results were significant because it was only one well-spacing unit above the proposed location for the 13-29 well. He understood that Sun Star was going to use scouts to verify this information, although he did not follow-up on whether they did so.

[304] Mr. Knoll said that the initial production of 3 months at 400 bbls/d was important to him because if you have a well that has that production capability and you are drilling a well only 300-400 metres south of it, you have a low geologic risk. Even if the well only came in at a quarter of that amount, it would still be a very effective well. To Mr. Knoll this was a development well, not an exploration well.

[305] Mr. Knoll acknowledged that in his last day of questioning he answered that he did not recall to questions about the 4-32 well; I have previously noted the health issues Mr. Knoll had on that day, and its atypical quality. In this case, however, I also observe that Mr. Knoll dealt with the issue of the initial production on a previous day of questioning and at that time gave an answer consistent with his testimony at trial – “it’s three months of IP production, 400 barrels a day”.

[306] The Defendants denied providing the Flow-Through Plaintiffs with inaccurate information about the 4-32 well. Mr. Hartland suggested that the reference in Mr. Kowal’s notes to the next door well could mean a well other than the 4-32 well. Mr. McCormick said that Mr. Rizopoulos was merely speculating on the production from the 4-32 well, but that at that point

they had no solid information; counting the trucks gave only nebulous information about what was going on.

[307] In an e-mail dated November 19, 2011, Mr. Rizopoulos advised Mr. Hartland and Mr. McCormick and others that “Based on the current 4-32 trucked report the 4-32 is flowing at 200-300 bbls/d based on the pump stroke speed and trucking off the lease, after they stimulated the well”.

[308] I prefer the evidence of the Flow-Through Plaintiffs to that of the Defendants about what they were told regarding the 4-32 well. Mr. Kowal’s evidence is confirmed by his notes of the time. Mr. Hubbs’ testimony is corroborated by the near-contemporaneous e-mail he sent in April 2012. The e-mails exchanged between the Defendants suggests that they exchanged information between themselves consistent with what the Flow-Through Plaintiffs say they were told. The documentation prepared by the Defendants, and in particular the Investor Presentation, is consistent with Mr. Knoll’s testimony, and Mr. Knoll was largely consistent on this point between questioning and trial.

[309] I also remain concerned about the credibility of the Defendants’ evidence on this point, as discussed previously. Further to that point, I note Mr. Hartland’s implausible claim – which did not match the evidence of Mr. McCormick – that the reference to the “next door” well could mean something other than the 4-32 well.

[310] In light of the documentary evidence, and the more credible testimony given by the Flow-Through Plaintiffs, I accept that the Flow-Through Plaintiffs were given false information about the production of the 4-32 well. Mr. Kowal and Mr. Hubbs were both given new information that the 4-32 well was now producing 250-300 bbls/d in the fall of 2011. Mr. Cutts still believed what he had been told earlier, that the 4-32 well produced 400 bbls/d on an ongoing basis. He passed that information on to Mr. Neil Devitt and Mr. Don Devitt. Mr. Knoll believed that the 4-32 well had produced 400 bbls/d in its first three months of production.

[311] None of this information was correct. The 4-32 well had come back on production in the fall of 2011 but produced only 12 bbls/d in November 2011. It did not produce 250-350 bbls/d when it came back on stream, it did not produce 400 bbls/d on an ongoing basis, and it did not produce 400 bbls/d in its first three months on production.

[312] The Defendants knew throughout that the 4-32 well did not produce 400 bbls/d on an ongoing basis or over its first three months of production. They also knew that they had no reliable information about the production of the 4-32 well in the fall of November 2011. Mr. McCormick himself said in his testimony that any information about the 4-32 well based on scouts was “nebulous”. Mr. McCormick told Mr. Kowal and Mr. Hubbs that the 4-32 well was producing 250-300 bbls/d without any thought to the truth or falsity of that statement. He could perhaps have made the statement relying on the e-mail from Mr. Rizopoulos, although Mr. McCormick did not suggest this was the case; he simply denied saying it.

Director and Officer Pay Structure

[313] Mr. Kowal and Mr. Cutts did not receive any new information about the Defendants’ pay through the flow-through share process and continued to believe that the pay would be performance-based through dividends. They did not know that the Defendants had started to receive a monthly salary.

[314] Mr. Cutts says he told Mr. Don Devitt and Mr. Neil Devitt that the founders were not being paid. Mr. Neil Devitt testified that he was told about the pay issue, but Mr. Don Devitt did not.

[315] Mr. Hubbs testified that he was told by Mr. McCormick that the founders would not “take a nickel” in salary, but would instead be paid in dividends, as would the investors.

[316] Mr. Knoll also testified that he was told by Mr. McCormick that they were not going to take salary, but only dividends.

[317] Mr. McCormick denied making these representations.

[318] I accept that the Flow-Through Plaintiffs did not know that the Defendants were taking a salary. I also accept that they were told, either directly or indirectly, that the Defendants would be paid based only on dividends.

[319] I hesitated over this conclusion because of the lack of contemporaneous documentation from the time of the flow-through share sale, and because the Defendants’ documents, and in particular the Business Plan, shows general and administrative expenses being paid, and at a high dollar amount. Further, saying that they were not taking a salary would have been an outright lie at the time of the flow-through share sale, whereas the time of the common share sale it was only misleading, and the record suggests that at that time the representation was somewhat qualified – “to be determined”.

[320] I ultimately reach my conclusion that Mr. Kowal, Mr. Cutts, Mr. Hubbs and Mr. Knoll did not know about the salary, and that Mr. Hubbs and Mr. Knoll were specifically told that the Defendants would be paid through dividends, on the following grounds. First, the contemporaneous record shows this representation was made to Mr. Kowal and Mr. Cutts on July 13, 2011. While it was only prospective at that time, given how quickly the Defendants paid themselves a salary after the common share sale, and given the evidence at trial of Mr. McCormick that it was always their intention to pay themselves a salary as soon as they could, it was also misleading. It makes sense to me to think that the Defendants would not materially have changed their approach of marketing the investment through representing that they were not taking a salary, and would not have disclosed to Mr. Cutts and Mr. Kowal that the earlier information they had provided was incorrect.

[321] I believe that Mr. Cutts saw this information as sufficiently important to share with Mr. Neil Devitt and Mr. Don Devitt. I also note that he and Mr. Neil Devitt were consistent on this point.

[322] In addition, I note the specificity of Mr. Hubbs’ recollection; I believe that Mr. McCormick would say to someone that he would not take a nickel of salary. Based on his testimony before me, it seems like the type of thing Mr. McCormick would say.

[323] In my view the claim that they would be paid through dividends was part of Mr. McCormick’s sales pitch to the Flow-Through Plaintiffs as well as to Mr. Kowal and Mr. Cutts when they bought the common shares: he claimed to be highly invested in the company, both through a front-end cash investment and through a back-end willingness to be paid through dividends. It was part of his pitch to make Sun Star attractive to investors, even though it was not true, and he knew that it was not true.

Tax Deductibility

[324] The Flow-Through Plaintiffs were all advised by the Defendants that the cost of purchasing the flow-through shares would be tax deductible. They submitted their tax returns on this basis and were initially successful in obtaining those deductions. Ultimately, however, the Canada Revenue Agency reviewed and disallowed the Flow-Through Plaintiffs' deductions associated with the purchase of the flow-through shares.

[325] I do not know why or on what basis the tax deduction was denied, and I make no finding about whether the information provided by the Defendants with respect to the tax treatment of the flow-through shares was false, or whether the Defendants bear any responsibility for the rejection of the tax deduction.

Due Diligence

[326] As was the case with the Common Share Plaintiffs, none of the Flow-Through Plaintiffs undertook any meaningful due diligence in relation to the information provided by the Defendants. They did not seek out independent information about the production from the 4-32 or 13-29 wells, or request additional documentation or records about Sun Star from the Defendants or their legal counsel.

Information Relied on by Flow-Through Share Plaintiffs

[327] I find that the Flow-Through Plaintiffs made their investment based on the positive information they were given about the initial results from drilling the 13-29 well and its predicted performance, and what they were told about the 4-32 analogue well and the founders' investment of \$2,500,000.

[328] I also find that Mr. Hubbs was influenced by the claim of Mr. McCormick that he would not be taking his pay in the form of a salary; given Mr. Hubbs' particular concerns about Mr. McCormick's approach to business, and the nature of the representation made to him by Mr. McCormick, I find that this representation had more significant to Mr. Hubbs than to the other Plaintiffs.

[329] For Mr. Knoll, by contrast, it was the information about the 3 months of production from the adjacent 4-32 well that most significantly influenced his decision to purchase the flow-through shares.

[330] The Defendants submitted that the primary motivation of the Flow-Through Plaintiffs was the tax deductibility of the share purchase, their trust in Mr. Hartland and Mr. McCormick and, particularly in the case of Mr. Knoll, the significant potential upside of the Montney asset.

[331] I accept that the Flow-Through Plaintiffs were in part motivated to purchase the flow-through shares as a result of the factors identified by the Defendants. Had the flow-through shares not been tax deductible, had they not trusted Mr. McCormick in particular, had the Montney asset not existed, the Sun Star flow-through shares would have been a less attractive investment.

[332] Ultimately, however, the facts that showed that Sun Star was a company worth investing in were the facts related to the immediate prospects of that company and its overall financial viability. A tax deduction does not make shares free of cost, and the ability to develop the Montney play depended on the financial return generated from the 13-29 well in the first instance. That the Flow-Through Plaintiffs, and most especially Mr. Kowal, Mr. Cutts, Mr.

Hubbs and Mr. Knoll, trusted Mr. McCormick made them believe that he told them; it did not make what he told them irrelevant to their decision to invest.

Purchase of the Flow-Through Shares

[333] On or about November 22, 2011, Mr. and Ms. Cutts subscribed for 80,000 flow-through shares (30,000 for Mr. Cutts and 50,000 for Ms. Cutts) at \$1 per share for a total cost of \$80,000, to bring their total investment in Sun Star to \$200,000.

[334] On about November 28, 2011, Mr. and Ms. Kowal each subscribed for 100,000 flow-through shares at \$1 per share for a total cost of \$200,000, bringing their investment in Sun Star up to \$500,000. They later changed their proportionate flow-through share holdings to 135,000 (Mr. Kowal) and 65,000 (Ms. Kowal). Ms. Kowal's subscription agreement is not dated and does not list the number of shares acquired.

[335] On or about November 3 and November 30, 2011, Mr. Neil Devitt subscribed for 70,000 flow-through shares at \$1 per share for a total cost of \$70,000.

[336] On or about November 25, 2011, Mr. Donald Devitt subscribed for 30,000 flow-through shares at \$1 per share for a total cost of \$30,000.

[337] On or about December 20, 2011, Mr. Knoll subscribed for 50,000 flow-through shares at \$1 per share for a total cost of \$50,000, and his wife Ms. Knoll also subscribed for 50,000 flow-through shares at \$1 per share for a total cost of \$50,000.

[338] On or about December 29, 2011, Mr. Hubbs subscribed for 200,000 flow-through shares at \$1 per share for a total cost of \$200,000.

Subscription Agreement

[339] Each of the Flow-Through Plaintiffs executed a subscription agreement. The subscription agreement contained numerous acknowledgements and representations, including that the investor was responsible for obtaining such advice as they needed, that the investment was risky, that no prospectus has been filed and that no regulatory body had made any finding or determination with respect to the merits of investing in the shares.

Kevin Orriss

[340] On or about November 30, 2011, Mr. Orriss purchased 30,000 flow-through shares for \$30,000.

[341] Mr. Orriss had previously received the Investor Presentation and Business Plan regarding Sun Star, and thus had available the information about the investment contained in those documents. Again, however, I do not have any evidence about what he did with those documents, and whether he reviewed or relied upon them.

[342] With respect to the flow-through purchase in particular, Mr. Cutts testified that he gave the same information to Mr. Orriss that he had given to Ms. Cutts, Mr. Neil Devitt and to Mr. Don Devitt with respect to the 13-29 well results, the tax benefits of the flow-through shares and the ability to invest after oil had already been discovered. They also discussed the information that had been relied on earlier with respect to the founders' investment and the 4-32 well.

[343] On being asked if he had reviewed each of these points with Ms. Cutts, Mr. Neil Devitt, Mr. Don Devitt and Mr. Orriss, Mr. Cutts said that he was sure they had because they talked on a regular basis and this investment was part of their discussions.

[344] As was the case with the common share investment, the issue with respect to Mr. Orriss is whether, in the absence of confirmatory testimony from him, Mr. Cutts' evidence about what he told Mr. Orriss regarding the investment is sufficient to discharge Mr. Orriss's burden of proof to show fraudulent misrepresentation.

Sun Star Management and Operations: August 2011-April 2012

[345] Between August 2011 and April 2012, Sun Star went from the hopeful beginnings of an oil and gas venture to failure.

[346] In August 2011, based on the successful common share issuance, the deposit cheque given to them by Western for drilling the 13-29 well, and the initial cash flow from Galleon, the Defendants decided to pay themselves. They paid themselves \$10,000 each backdated to January 2011 and continued to pay themselves \$10,000 per month each going forward.

[347] In November and December 2011, they also repaid the \$190,110.11 loan that had been made by Condo-Condo.

[348] In addition, through this time Sun Star paid amounts to Condo-Condo in rent and also for salaries of Condo-Condo employees who, the Defendants say, provided services to Sun Star.

[349] In January 2012, Sun Star received a reserve evaluation from Sproule Associates Limited. The reserve evaluation was positive about Sun Star's asset value, identifying the proved plus probable reserves at a 10% discount rate as having a value of \$10,682,000.

[350] By April 2012, the 13-29 well had come fully on to production but was producing far below expectations – it produced 38 bbls/day in February 2012 and 28 bbls/day in March 2012 – while incurring nearly double its estimated drilling costs.

[351] It also turned out that when the 4-32 well came back on production in 2011, it produced very little – on average in 2011 it produced 21.56 bbls/day and in 2012 only 16.34 bbls/day.

[352] By April 2012, Sun Star had significant debt, considerable expenditures for salaries and office costs, and minimal cash flow.

[353] Relationships between the Defendants broke down. In April 2012, Mr. Rizopoulos left the company and threatened a lawsuit for the nearly \$4 million he felt he was owed as a result of his efforts to build the company. Mr. Rizopoulos ultimately abandoned his lawsuit.

[354] Mr. Hartland and Mr. McCormick reduced their pay in April 2012 from \$10,000 a month to \$6,000 a month and brought in Jim Gotmy to assist them following Mr. Rizopoulos's departure.

[355] On or about May 30, 2012, Sun Star obtained financing from Tallin Capital Mezzanine Limited Partnership for just under \$1,000,000 (after the deduction of a commitment fee). Mr. Hartland and Mr. McCormick gave personal guarantees of \$250,000 each to secure that financing.

[356] At around that time and up to July 2012, Sun Star offered debentures to vendors to whom they had accounts payable to reduce their indebtedness to those vendors.

[357] Things continued to go badly for Sun Star. On average in 2012, the 13-29 well produced 17.34 bbls/day. In 2013, it produced 19.85 bbls/d in the one month it was on production.

[358] Ultimately Sun Star sold Montney for \$630,000 to Shell – an amount significantly higher than the \$113,000 they paid for it. This was a positive outcome given that, when Shell drilled it, they hit water not oil.

[359] The September 2012 unaudited financial statements for Sun Star, which include 2011 comparables, show that in September 2011 the company had no revenues, and its operating expenses were \$310,012. By September 2012 it had earned \$566,904 in petroleum and natural gas sales and from royalties and had \$1,151,739 in expenses, \$783,941 of which was general and administrative expenses.

[360] In the end, Mr. Rizopoulos was paid \$183,000 from Sun Star through management fees paid to his company Hyperion. Mr. Hartland and Mr. McCormick were each paid \$234,400 from 2011 through 2013 (\$220,800 from 2011 through 2012). Mr. Hartland, Mr. McCormick and Mr. Rizopoulos thus collectively took \$651,800 from the company in salary despite Sun Star's total revenues from oil and gas sales and royalties being only \$1,084,770.

Breakdown of Plaintiffs-Defendants Relations

[361] It took some time for the Plaintiffs to become aware of the extent of the issues with Sun Star. Through January, February and March 2012 Mr. Kowal and Mr. Cutts were told that the 13-29 well was producing at a higher level than it was. In February and March, for example, Mr. Rizopoulos told Mr. Kowal and Mr. Cutts that the production was 100 and 75 bbls/day, when the actual production was 38 and 29 bbls/day in those months.

[362] It was only in April 2012, when Mr. Rizopoulos left Sun Star and met with Mr. Kowal and Mr. Cutts, that they obtained a fuller picture, learning not only about the poor production from the 13-29 well but also about the pay to the Defendants, that the Defendants had not put any cash into the company but only 'sweat equity', that the Defendants held 10,000,000 shares and that the 4-32 well had a significant decline from its production in the first month.

[363] Mr. McCormick claims that the shareholders were told of the financial issues the company was having as soon as they arose, but the documentary evidence does not substantiate this claim; it suggests, rather, that the Plaintiffs either were not kept informed or were told things were going better than they were.

[364] Relations between the Defendants and the Plaintiffs deteriorated. On or about March 7, 2013, Mr. Kowal and Mr. Cutts sent letters to the minority shareholders saying that they had a cause of action for negligent or fraudulent misrepresentation and breach of fiduciary duty, as well as a claim for oppression. They invited other investors to join the action.

[365] On or about March 25, 2013, Mr. Hartland wrote to the shareholders, saying that the letter from Mr. Cutts and Mr. Kowal was "misleading, incorrect and defamatory". They acknowledged that there were issues with the 13-29 well, but that this was not "as a result of management's derogation from its announced plans or through any negligence on the part of directors of Sun Star". Mr. Hartland said that they had managed the company appropriately despite difficult circumstances.

[366] In February 2013, Mr. Hubbs sent an e-mail to Mr. Hartland and Mr. McCormick accusing them of fraud, and of not providing him with proper information. In May 2013, counsel

for Mr. Hartland and Mr. McCormick accused Mr. Hubbs of defamation. Mr. Hubbs responded that he had retracted his statements, but also advised counsel for Mr. Hartland and Mr. McCormick that he had filed suit against them.

[367] In 2013, the Clements phoned Mr. McCormick and recorded the phone call. Ms. Clement said she recorded it because they were in the middle of a home build, and she wanted to ensure an accurate record of the call. She acknowledged in cross-examination that she had not recorded other conversations related to the investment in Sun Star.

[368] In the call Mr. McCormick described Mr. Kowal and Mr. Cutts as “disgruntled”. He said that the cost overruns on the 13-29 well were because of Mr. Rizopoulos’s negligence, emphasized that they had believed the company was going to be successful, and saying that they were doing what they could to manage things. Mr. McCormick said that the Clements might be approached by Mr. Kowal and Mr. Cutts who are “trying to get some of [the investors] to band with them”.

[369] Mr. McCormick said in the call that the 4-32 well had “IP at a very high rate”, but that there was no public knowledge as to what it was actually producing. He emphasized that Sproule had given them a positive analysis of the 13-29 well. He suggested that the problems were because of how Mr. Rizopoulos had fracked the well, although he also said that the 4-32 well was now back on production and not doing very well.

[370] Mr. McCormick suggested there was a \$2,000,000 offer to purchase the 13-29 well, and that he was trying to negotiate a gross overriding royalty for Sun Star as part of that transaction. He said, though, that it would still not be enough to pay the shareholders. He said that third parties had invested \$2,000,000.

[371] At that point Ms. Clement said “so, 2 million and then you had 2,500,000 invested originally between the two of you?”. Mr. McCormick responded:

Between – well Les and I had originally some money that was lent to Sun Star, Les and I, should say, our holding company lent some money – lent a loan to Sun Star Energy for some original land investments. And ah –

[Mr. Clement interjects saying “Bob, we’re just looking at the 3 year business model which you gave us and when I read initially into this that...the founders had \$2.5 million into it...”]

That was a guestimate of value of the assets that we had in the company at that point in time. Not hard cash investment...

[The Clements ask, what assets?]

Well, primarily the ah, ah, the 8,000 acres that we sold to Shell. So when we had that cost overrun, when we got, when we went to Shell to essentially farm into their land and we turned the table around and asked them if they’d purchase our land, and ah, we managed to sell 8,000 acres to them or sell the lease opportunity to them.

[Ms. Clement: “did you sell that land for \$2 ½ million?”]

No, we sold it for \$550,000...

But we were forced to sell at the time because we had a million and a half dollars in payables that we didn't have the money to pay.

[Mr. Clement points out that he is talking about the period prior to investing]

Well there was the land and the plays that we had tied up and then the cash that we raised through flow through and common shares. That's what... [emphasis added]

[372] In short, Mr. McCormick's answers here were evasive, trying to shift the conversation away from the question the Clements asked him, and in his answer never mentioned the sweat equity that the Defendants now claim was what made up the \$2,500,000; rather, he said it was a "guestimate of the assets", mentioning the land sold to Shell, and the plays that had been tied up.

[373] The Plaintiffs filed their Statement of Claim on May 7, 2013.

Analysis

Summary of the Law

Test for Civil Fraud

[374] The Supreme Court set out the current test for civil fraud in its 2014 decision in **Bruno Appliance and Furniture, Inc v Hyrniak**, 2014 SCC 8. The Court held that to establish liability for civil fraud the Plaintiff must show:

(1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss: **Hyrniak** at para 21.

[375] Prior case law also required that the defendant intend to deceive the plaintiff: **Stack v Hildebrand**, 2010 ABCA 108 at para 13; **TWT Enterprises Ltd v Westgreen Developments (North) Ltd**, 1992 ABCA 211 at para 14.

[376] The Supreme Court in **Hyrniak** did not include the intention to deceive in its four-part test, although it also did not expressly reject the intention requirement. Subsequent appellate decisions suggest that the ongoing relevance of the intention requirement is uncertain: **Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd.**, 2017 ABCA 378 at para 29-30; **Singh v Trump**, 2016 ONCA 747 at para 141.

[377] The Alberta Court of Appeal has emphasized, however, that to the extent an intention to deceive does need to be established, it can be inferred on the evidence as a whole, including "a lack of evidence of a credible explanation of the concealment or false representation of the actor": **Precision Drilling** at para 32.

[378] To constitute civil fraud the misrepresentations must be ones of fact, not future intention; the misrepresentations cannot be "mere puffery": **Motkoski Holdings Ltd v Yellowhead (County)**, 2010 ABCA 72 at para 45, citing **Derry v Peek** (1889) 14 AC 337 at 374. The representations must be made by the defendant or its representatives: **Motkoski** at para 41.

[379] The requirement that the defendant know that the representation is false can be established by showing that the defendant had actual knowledge of falsity, but also by showing that the defendant did not believe the statement to be true, or did not care whether it was true or

false: *Hyrniak* at para 18, citing *Derry v Peek* at 374; *Precision Drilling* at para 29. As the Court of Appeal said in *Motkoski* at para 58, recklessness requires more than negligence. Recklessness is not established by saying that the defendant “‘should have known’ the truth, or should have been more careful and made further inquiries”; it requires the defendant to have been indifferent to the truth of the statement at the time when they made it. At the same time, however, a defendant who shuts their eyes to the facts, or purposely abstaining from inquiring into them, cannot claim to have had an honest belief in those facts: *Precision Drilling* at para 35, citing *Derry v Peek*.

Proof and Pleadings

[380] The burden of proof for establishing civil fraud lies on a plaintiff, who must establish the elements of the test for civil fraud on the balance of probabilities.

[381] Older Alberta case law, relied upon by the Defendants, said that, given the serious and stigmatizing nature of civil fraud, the standard of proof “‘must be met by cogent and convincing evidence”’: *TWT* at para 39 (Belzil JA, dissenting on other grounds).

[382] The proposition that proof of civil fraud requires a particular type of evidence is cast into doubt by the Supreme Court’s decision in *F.H. v McDougall*, 2008 SCC 53. In that case the Supreme Court emphasized that the burden of proof in all civil cases requires the plaintiff to establish on the evidence that “‘it is more likely than not that the event occurred”’: *McDougall* at para 44. All cases require serious scrutiny of the evidence, and all require that the evidence be “‘sufficiently clear convincing and cogent to satisfy the balance of probabilities test””; “‘it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case”’: *McDougall* at para 46, 45.

[383] The plaintiff must plead fraud specifically; Rule 13.6(3) of the Rules of Court requires that the allegations contain sufficient particulars to allow the defendant to know the case they have to meet. This includes a description of the misrepresentation, who made it, to whom and when: *Elliott v Rainbow Homes Ltd*, 2018 ABQB 328 at para 4.

Defences

[384] Generally speaking, a person is only liable for misrepresentations made by them or their representatives: *Hyrniak* at para 26; *Motkoski* at para 41.

[385] An exception to this principle arises where the parties are joint tortfeasors because of the nature of the relationship between them. This includes where “‘two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another”’: *The Koursk*, [1924] P. 140 at 155 per Scrutton LJ.

[386] In a 2000 decision of the British Columbia Court of Appeal, Justice Southin applied this rule to fraudulent misrepresentation: “‘the facts of this case bring the appellants within the third of Scrutton L.J.’s categories. They agreed on the common action of selling together both the real property and the business and in the course of negotiating that sale, and to further that sale, the female appellant committed the tort of deceit....Thus, the appellants are joint tortfeasors”’: *Osborne v Pavlick*, 2000 BCCA 120 at para 23-24; *Cruise Connections Canada v Szeto*, 2015 BCCA 363 at para 49; *Harrison v Biggs* (1992) 74 BCLR (2d) 164 at para 53-56.

[387] *Koursk* was cited with approval although distinguished in *MacLachlan & Mitchell Homes Ltd. v Frank's Rentals and Sales Ltd.*, 1979 ABCA 258 at para 27.

[388] *Osborne* has not been relied upon in Alberta (although it was noted in *Ellmar Developments Ltd v Bearspaw Development Inc*, 2016 ABQB 221 at para 70). Relatedly, however, in a 2005 decision, Watson J. (as he then was) explained the concept of joint tortfeasors and reviewed the law in detail. He held that “persons are considered joint tortfeasors if (1) they engage in concerted action towards a common goal or (2) if they agree on a common course of action and one person commits a tort in furtherance of that agreement, provided the course of action was tortious in itself”: *Raywalt Construction Co. Ltd v J.R.B.*, 2005 ABQB 989 at para 334. The concerted action does not need to be tantamount to a conspiracy; it can be characterized as a “common enterprise voluntarily entered into to a significant degree”: *Raywalt* at para 349; 361.

[389] In addition, a corporation may be held liable for fraudulent acts taken by its directing minds on its behalf and in furtherance of its interests:

Once the dishonest employees are found to have been the directing minds of the company and once it is found that they were at the time of the commission of the dishonest acts acting in the course of their employment, in the sense that they were carrying out the enterprise and policies of the corporate employer, then their dishonest actions are attributed to the company whose liability in criminal law follows: *Canadian Dredge and Dock Co v The Queen* [1985] 1 SCR 662 at para 58.

[390] In deciding whether to hold a corporation liable in the civil context, a court may also consider whether imposing liability on the corporation is in the public interest: *Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63 at para 104.

[391] A defendant cannot rely on an exclusionary clause in a contract where the defendant’s fraudulent misrepresentation induced the plaintiff to enter into the contract: *Condominium Plan No. 822 2960 (Owners) v 75252 Manitoba Ltd.*, 1999 ABQB 111 at para 48; *TWT* at para 18; *1018429 Ontario Inc v Fea Investments Ltd*, (1999) 125 OAC 88 at para 50-54.

[392] A defendant also cannot rely on the plaintiff’s lack of due diligence, or that the dishonesty was easily discovered, as a defence to fraudulent misrepresentation: *Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para 67: “It should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected”.

[393] The Supreme Court cited with approval the decision of Southin J. (as she then was) in *United Services Funds (Trustees of) v Richardson Greenshields of Canada Ltd*, (1988) 22 BCLR (2d) 322 at para 63-64 where she explained that a victim’s gullibility offers the fraudster no defence:

Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.

And, in my opinion, a good thing, too. There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual

guard against rogues lest we be faced with a defence of "Ha, ha, your own fault, I fool you". Such a defence should not be countenanced from a rogue.

Damages

[394] A plaintiff who shows that they entered into a contract as a result of fraudulent misrepresentation is entitled to an award of damages to compensate it for the losses it experienced as a result of the misrepresentation: *Doyle v Olby (Ironmongers) Ltd*, [1969] 2 All ER 119 at 122; *Royal Bank of Canada v Benchmark Real Estate Appraisals Ltd*, 2015 ABQB 288 at para 40.

Did the Defendants Commit Civil Fraud?

[395] With the exception of Mr. Orriss, each of the Plaintiffs in this case has discharged their onus and has established the liability of the Defendants for civil fraud. Because the particulars of the fraud vary between Plaintiffs, and some Plaintiffs raise legal issues that others do not, this section considers each Plaintiff's case individually. Some issues with respect to the liability of the Defendants arise for multiple Plaintiffs; the issues are discussed most comprehensively in the analysis of the claims of Mr. Kowal and Ms. Kowal, with which I begin.

Raymond David Kowal

[396] Mr. Kowal has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the common shares and flow-through shares in Sun Star.

[397] First, the evidence shows that Mr. Hartland, Mr. McCormick and Rizopoulos made false representations to Mr. Kowal.

[398] In the Investor Presentation and Business Plan they made false representations to Mr. Kowal about the 4-32 well, the founders' investment and the shares held by the founders. Mr. Rizopoulos wrote those documents, but Mr. Hartland and Mr. McCormick were provided with many drafts of them, had the opportunity to comment upon and revise them, and provided them to Mr. Kowal knowing the information they contained.

[399] Further, at meetings attended by all three individual defendants prior to his purchase of the common shares, Mr. Kowal was given false information about the 4-32 well and information that tended to confirm the false information in the Business Plan about the share structure of Sun Star. He was also told falsely that the investors would not take a draw or be paid from cash flow, although Mr. McCormick later qualified that information by telling Mr. Kowal that while pay was to be performance based, the issue was to be determined.

[400] In addition, Mr. Rizopoulos repeated to Mr. Kowal the false information that the founders had invested \$2,500,000. Mr. Hartland and Mr. McCormick were not present at the meeting when that additional false statement was made.

[401] During the flow-through share process, the false representations to Mr. Kowal came from Mr. McCormick and Mr. Rizopoulos; Mr. Hartland did not meet with Mr. Kowal at that time. Mr. Kowal was falsely told at a meeting with Mr. McCormick and Mr. Rizopoulos that the 4-32 well had come back on production and was producing 250-300 bbls/d and that amount had been confirmed by scouts. Mr. McCormick and Mr. Rizopoulos also gave Mr. Kowal projections about the 13-29 well that had no basis in the facts available at that time.

[402] Second, the evidence shows that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos made these representations to Mr. Kowal with the requisite level of knowledge of their falsity. They all knew that the information they provided to Mr. Kowal about the 4-32 well, the founders' investment and the shares they held in Sun Star was false. They knew that it was not true to say that they would not take a draw or be paid from cash-flow. In addition, Mr. McCormick and Mr. Rizopoulos provided Mr. Kowal with projections about the 13-29 well's future performance without any thought to the truth or accuracy of those projections, and without regard to the actual information available to them about the 13-29 well.

[403] Third, the evidence shows that Mr. Kowal relied upon the false representations made by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos in deciding to purchase the common shares and flow-through shares.

[404] Finally, the evidence shows that Mr. Kowal suffered a loss as a result of his reliance. He paid \$100,000 for common shares and another \$100,000 for flow-through shares and lost the entirety of that investment due to the collapse of Sun Star.

[405] I also find the Defendants to be jointly liable for the misrepresentations on which Mr. Kowal relied. It does not matter that Mr. Rizopoulos prepared the documents, who spoke at the meetings attended by all of them, or that on some occasions Mr. Hartland was not present. This case falls within the principles set out in *The Koursk* and discussed in *Raywalt*. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos acted in concert on a common enterprise. They all knew the information that investors were being given, and they knew that in material respects that information was false. I can infer from the evidence and the facts as discussed above, that they together created a scheme to attract investors despite the fact that, when described honestly and accurately, the investment they were marketing was not especially attractive. They wanted to sell Sun Star shares, and none of them were concerned with ensuring that they did so honestly and truthfully. That from time to time one took a more active role does not change the collective nature of their conduct and responsibility. They are jointly liable for fraudulent misrepresentations made in pursuit of the common fraudulent enterprise in which they engaged.

[406] The evidence also establishes the Defendant Sun Star's liability for the misrepresentations made by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos to Mr. Kowal. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos were the directing minds of Sun Star and acting in furtherance of its enterprise and objectives when seeking investors in its common shares and flow-through shares, such that the principle of corporate identity applies. The public interest favours the application of the corporate identity doctrine; it favours holding Sun Star accountable for the frauds perpetrated by its directing minds to generate the equity and cash it needed to further its corporate endeavours.

[407] The evidence before me shows that Mr. Kowal could have avoided being duped had he reviewed the materials he was given with a more skeptical eye. The Defendants' fraud was not executed with much sophistication, and their own materials hinted at the falsity of the representations they were making. The documents themselves should have alerted Mr. Kowal to the need to ask critical questions about the information he was being given, to at minimum ask for legible copies of the production data and graphs for the 4-32 well and to ask for an explanation of the differences between the Investor Presentation and the Business Plan.

[408] But the law quite properly prevents the Defendants from escaping liability simply because Mr. Kowal was too trusting. That Mr. Kowal took them at their word, and did not pick

up on the clues suggesting that what they said ought not to be believed, does not allow them to avoid their legal and moral responsibility for the fraud they committed.

[409] I note in this respect that having seen Mr. Hartland, Mr. McCormick and Mr. Rizopoulos testify I understand why Mr. Kowal believed and trusted them. They tell their story with an apparent sincerity that gives it a veneer of truth even when, based on the totality of the evidence, I can see that it was not.

[410] The Defendants submitted in argument that the things that could have alerted Mr. Kowal to the fact that the information he received was false show that they did not intend to deceive Mr. Kowal. They also pointed out that Sun Star was a legitimate business as evidence of their claim that they did not intend to deceive the Plaintiffs. It may not have succeeded, but it acquired assets and the Defendants worked hard to make those assets a success.

[411] Assuming without deciding that the test for fraudulent misrepresentation includes an intention to deceive, I do not accept the Defendants' submission on this point. It does not account for the fact that the Defendants made false representations on numerous occasions and on several facts important to Mr. Kowal's decision to invest. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos's consistent disregard for the truth, and willingness on numerous occasions to state facts they knew to be untrue, show an intention to deceive that a certain clumsiness in execution does not negate.

[412] It is true that Sun Star was not itself a fraud, and money invested by Mr. Kowal and the other Plaintiffs was in fact used to pursue its oil and gas ventures. What was a fraud, however, was the manner in which the Defendants persuaded Mr. Kowal to invest in Sun Star. Had the Defendants told Mr. Kowal the truth – that they had acquired the assets for less than \$190,000, that the adjacent 4-32 well had been shut in after three months when its production dropped to 59 bbls/d, that they had put none of their own money at risk, and that they already held 10,000,000 shares for which they paid nothing, it is most unlikely that he would have invested \$500,000 in their venture (when adding in the investment of Eagle Tree and Ms. Kowal). Instead of telling Mr. Kowal those true facts the Defendants constructed a false narrative to make Sun Star seem like a desirable low-risk high-reward venture; they intended to deceive him, and they did so.

[413] I accept the Defendants' position that Mr. Kowal's claim against the Defendants is constrained by the pleadings; the law clearly provides that pleadings must identify and sufficiently particularize a claim of fraudulent misrepresentation for it to be properly before the Court.

[414] The Amended Amended Amended Statement of Claim filed December 22, 2015 sufficiently particularizes Mr. Kowal's claim of fraudulent misrepresentation in relation to the 4-32 well, the founders' investment and the shares that had been issued to the founders. It does not specifically refer to the shares in the Business Plan but it does identify the stated net asset value per share of \$3.85 as one of the "deceitful and fraudulent statements and representations" made by the Defendants; this gave the Defendants sufficient notice that the honesty of their reported shares was at issue.

[415] The Amended Amended Amended Statement of Claim does not, however, allege that the statements made by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos about how the directors and officers would be paid were a deceitful and fraudulent statement and representation. It

identifies the amount they took in salary as an issue in relation to breach of fiduciary duty and oppression, but not as a fraudulent and deceitful statement.

[416] It is difficult to determine whether the pleadings in this case should constrain this Court's consideration of the false statements made by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos about their pay. It may be that the Defendants had sufficient notice of the case they had to meet given the pleadings as a whole: *40 Sunpark Plaza Inc. v 850453 Alberta Inc.*, 2007 ABQB 54 at para 43. On the other hand, the pleadings impugn the salaries taken by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos based on their unreasonableness, not based on what was said about them or on the Plaintiffs having been misled. At trial, counsel for Mr. Hartland and Mr. McCormick objected to consideration of the pay issue. He said that the Plaintiffs had sought a further amendment to their pleadings to include this claim, and that further amendment was denied.

[417] Without endorsing a technical approach to pleadings, I am satisfied that I ought not to include any false statements made about salaries in my assessment of whether the Defendants committed fraudulent misrepresentation.

[418] Based on the other false statements made to Mr. Kowal, however, and the analysis previously set out, the Defendants are nonetheless jointly liable to him for the \$200,000 loss he suffered as a result of purchasing the common and flow-through shares in Sun Star.

Janet Irene Kowal

[419] Ms. Kowal has discharged her burden of showing that the Defendants are liable for the losses she incurred as a result of purchasing the common shares and flow through shares in Sun Star.

[420] While Ms. Kowal testified that Mr. Kowal repeated false representations made by the Defendants, and I accepted her testimony on this point, her central claim was that she made the decision to invest in Sun Star based on Mr. Kowal's advice and information. She did not speak to Mr. Hartland, Mr. McCormick or Mr. Rizopoulos, and she did not review the Investor Presentation or Business Plan. Mr. Kowal did so, however, and he relied on the fraudulent misrepresentations made to him not only in deciding to buy the common shares and flow-through shares, but also in advising Ms. Kowal to do so.

[421] The issue with Ms. Kowal's claim is, therefore, whether the fraudulent misrepresentations to her husband, on which he relied in advising her to buy common shares and flow through shares in Sun Star, are sufficient to discharge her onus of showing that the Defendants are liable to her for fraudulent misrepresentation. Does the fact that the fraudulent misrepresentations were not made directly to her shield the Defendants from liability?

[422] It does not. I accept that in some circumstances fraudulent misrepresentations not having been made directly to a plaintiff may support an argument against liability for those misrepresentations. I can imagine a scenario where X makes a false statement to Y knowing that Y has no reason to rely on the statement, and will not do so; Y believes the false statement but does not rely on it; Y then repeats the statement to Z, who also believes the statement and does rely on it, to their loss. I think X might have an argument that they cannot be held responsible for the false statement having been repeated to Z when they did not intend for it to be, did not benefit from it being repeated and, perhaps, did not anticipate that it would be.

[423] Whether or not X would succeed in that argument, the case before me is entirely different from that hypothetical. Mr. Hartland, Mr. McCormick and Mr. Rizopoulos knew that Ms. Kowal was making an investment based on the advice and information provided by her husband. They must have done, since she had no other basis on which she could have decided to make the investment; they had not spoken with her or provided her with any information. It would have been obvious and apparent to Mr. Hartland, Mr. McCormick and Mr. Rizopoulos that Ms. Kowal was going to rely on the advice and information of Mr. Kowal, since he was directly connected to her and the person to whom they had given the information about the Sun Star investment. In addition, all of the Defendants knew of – and indeed directly profited from – Ms. Kowal’s decision to invest in Sun Star based on her husband’s advice. There is no meaningful separation between the Defendants’ fraudulent misrepresentations, Ms. Kowal’s decision to invest in Sun Star, and the consequent loss she suffered.

[424] The law seems to accept it as obvious that a fraudster who relies on intermediaries to execute the fraud, including innocent intermediaries, can be held accountable as if they had executed the fraudulent act themselves. In **R v Stoltz**, (1993) 84 CCC (3d) 422, the British Columbia Court of Appeal found *prima facie* evidence that Mr. Stoltz had committed a fraud on the Court when he lied to his lawyer, and that lawyer repeated the lie to the Court: “Mr. Stoltz through the intermediary of the duped solicitor, has perpetrated a fraud on the court”: **Stoltz** at 426. In **R v Steinhubl**, 2010 ABQB 602 Bielby J (as she then was) found at para 98 that the Crown had proven “the essential element of the use of deceit, falsehood or other fraudulent means” where the Crown had proven that the accused arranged to have misrepresentations made “through a chain of intermediaries”. She found at para 101 that the “accused directly or indirectly but knowingly induced the straw buyers to make these misrepresentations”.

[425] Here, Mr. Hartland, Mr. McCormick and Mr. Rizopoulos duped Mr. Kowal; Mr. Kowal then advised Ms. Kowal based on the false information with which they had provided him. Ms. Kowal relied on that advice and suffered a loss for which the Defendants are as liable as if they had made the false representations directly to Ms. Kowal.

[426] For the reasons set out with respect to Mr. Kowal, that liability extends to Sun Star, and I reject the other arguments made by the Defendants to avoid liability.

[427] The Defendants are jointly liable to Ms. Kowal for the \$200,000 she lost as a result of her purchase of the common shares and flow-through shares in Sun Star.

Eagle Tree Investments

[428] As noted, Mr. and Ms. Kowal own Eagle Tree and Mr. Kowal is the President of Eagle Tree, making decisions on its behalf.

[429] Eagle Tree has discharged its burden of showing that the Defendants are liable for the losses it incurred as a result of purchasing the common shares in Sun Star. Because Mr. Kowal was the directing mind and made decisions for Eagle Tree, the Defendants’ liability to Eagle Tree rests on the same foundations as their liability to Mr. Kowal. The fraudulent misrepresentations they made to Mr. Kowal were misrepresentations to him both personally and in his capacity as the President of Eagle Tree. The reasons provided above with respect to Mr. Kowal are adopted here with respect to Eagle Tree.

[430] The Defendants are jointly liable to Eagle Tree for the \$100,000 it lost as a result of its purchase of common shares in Sun Star.

Otto David Cutts

[431] Mr. Cutts has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the common shares and flow through shares in Sun Star.

[432] First, the evidence shows that Mr. Hartland, Mr. McCormick and Rizopoulos, made false representations to Mr. Cutts.

[433] As was the case with Mr. Kowal, through the Investor Presentation and Business Plan Mr. Hartland, Mr. McCormick and Mr. Rizopoulos made false representations about the 4-32 well, the founders' investment and the shares held by the founders. In addition, and again like Mr. Kowal, at meetings attended by all three individual defendants prior to his purchase of the common shares, Mr. Cutts was given false information about the 4-32 well and information that tended to confirm the false information in the Business Plan about the share structure of Sun Star.

[434] In addition, at a meeting with Mr. Hartland, Mr. McCormick and Mr. Rizopoulos in August 2011, Mr. Cutts was falsely told that the production from the 4-32 well had been verified by reports from scouts.

[435] During the flow-through share process, Mr. Cutts largely relied on information with which he had previously been provided. The only new information he was given were the projections by Mr. McCormick and Mr. Rizopoulos about the 13-29 well that had no basis in the facts available to Mr. McCormick and Mr. Rizopoulos at that time.

[436] Second, for the reasons set out in the analysis of Mr. Kowal's claim, the evidence shows that Mr. Hartland, Mr. McCormick and Mr. Rizopoulos made these representations to Mr. Cutts with the requisite level of knowledge of their falsity.

[437] Third, the evidence shows that Mr. Cutts relied upon the false representations made by Mr. Hartland, Mr. McCormick and Mr. Rizopoulos in deciding to purchase the common shares and flow-through shares.

[438] Finally, the evidence shows that Mr. Cutts suffered a loss as a result of his reliance. He paid \$60,000 for common shares, and another \$30,000 for flow-through shares, and lost the entirety of that investment due to the collapse of Sun Star.

[439] For the reasons set out with respect to Mr. Kowal, the Defendants are jointly liable to Mr. Cutts, and I reject the other arguments made by the Defendants to avoid liability.

[440] Thus, I find the Defendants jointly liable for the \$90,000 in losses suffered by Mr. Cutts by virtue of his purchase of the common shares and flow through shares in Sun Star.

Lois M. Cutts

[441] Ms. Cutts has discharged her burden of showing that the Defendants are liable for the losses she incurred as a result of purchasing the common shares and flow through shares in Sun Star.

[442] Like Ms. Kowal, Ms. Cutts testified that Mr. Cutts repeated to her some of the fraudulent misrepresentations made by the Defendants, including in her case the misrepresentation that scouts had verified the production from the 4-32 well as 400 bbls/d. Also like Ms. Kowal,

however, Ms. Cutts' evidence was primarily that she relied on the advice of Mr. Cutts in deciding to purchase the common shares and flow-through shares of Sun Star.

[443] For the reasons set out in my analysis of Ms. Kowal's claim, I find the Defendants jointly liable to Ms. Cutts for the fraudulent misrepresentations made to Mr. Cutts that informed his advice to Ms. Cutts to purchase the common shares and flow through shares in Sun Star. Specifically, they are jointly liable to her for the \$110,000 in losses she suffered as a result of the \$60,000 she spent on common shares and the \$50,000 she spent on the flow through shares.

Marc and Terry Lynn Clement

[444] Mr. and Ms. Clement have discharged their burden of showing that the Defendants are liable for the losses they incurred as a result of purchasing the common shares in Sun Star. I discuss their claims together because they both attended the meeting where the misrepresentations were made, and they both received the Investor Presentation and the Business Plan.

[445] First, Mr. and Ms. Clement were provided with false information in the Investor Presentation about the 4-32 well, the founders' investment and the shares issued to the founders. At their meeting in June 2011 with Mr. McCormick and Mr. Rizopoulos, Mr. and Ms. Clement were told that the production from the 4-32 well was 400 bbls/d and also that the founders had invested \$2,500,000. All of that information was false.

[446] Second, for the reasons set out earlier in the analysis of Mr. Kowal's claim, the Defendants provided that false information to Mr. and Ms. Clement with the requisite knowledge of its falsity.

[447] Third, the evidence shows that Mr. and Ms. Clement relied on that false information and suffered a loss. In particular, they lost the \$50,000 they spent acquiring common shares in Sun Star.

[448] For the reasons set out in my analysis of Mr. Kowal's claim, the Defendants are jointly liable for that loss, and I reject all of the arguments made by the Defendants to avoid liability.

Neil Gordon Devitt

[449] Mr. Neil Devitt has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the flow through shares in Sun Star.

[450] Unlike Ms. Kowal and Ms. Cutts, Mr. Neil Devitt did not rely on the advice of Mr. Cutts in deciding to purchase his shares. He did, however, rely on the fraudulent misrepresentations made to Mr. Cutts that Mr. Cutts then repeated to him. For the reasons set out in my analysis of Ms. Kowal's claim, I find the Defendants liable to Mr. Devitt for the fraudulent misrepresentations made to Mr. Cutts and repeated to Mr. Devitt. The evidence shows that Mr. Devitt relied on those misrepresentations and suffered a loss. They were misrepresentations made through an innocent intermediary for which the Defendants are responsible. Further, the misrepresentations were made with the intention to deceive people to whom they were repeated as well as to the people to whom they were made.

[451] For the reasons set out with respect to Mr. Kowal, that liability extends to all of the Defendants, and I reject the arguments made by them to avoid liability.

[452] The Defendants are jointly liable to Mr. Neil Devitt for the \$70,000 he lost as a result of spending \$70,000 to purchase flow through shares in Sun Star.

Donald S. Devitt

[453] Mr. Donald Devitt has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the flow through shares in Sun Star. The basis for the Defendants' liability to Mr. Donald Devitt is the same as for their liability to Mr. Neil Devitt.

[454] The Defendants are jointly liable to Mr. Donald Devitt for the \$30,000 he lost as a result of spending \$30,000 to purchase flow through shares in Sun Star.

Lerry Hubbs

[455] Mr. Hubbs has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the flow through shares in Sun Star.

[456] Mr. McCormick told Mr. Hubbs that he and Mr. Hartland had each invested \$1,250,000 in Sun Star, and that Mr. Rizopoulos had provided \$1,400,000 in property. That was not true. In addition, Mr. McCormick told Mr. Hubbs that the 4-32 well had a 285 bbls/d flow rate. That was also not true. Mr. McCormick made these statements knowing them to be untrue. The evidence shows that Mr. Hubbs relied on these statements in deciding to spend \$200,000 in flow through shares.

[457] For the reasons given in the analysis of Mr. Kowal's claim, the Defendants are jointly liable for the false statements made by Mr. McCormick to Mr. Hubbs, and I reject the various arguments made by the Defendants to avoid liability.

[458] As a result, I find the Defendants jointly liable to Mr. Hubbs for the \$200,000 loss he suffered as a result of purchasing the flow through shares in Sun Star.

Robert Knoll

[459] Mr. Knoll has discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the flow through shares.

[460] Mr. McCormick showed the Investor Presentation to Mr. Knoll and represented to Mr. Knoll that the 4-32 well had produced 400 bbls/d, which Mr. Knoll understood to be the case over the well's first three months of production. Mr. McCormick told Mr. Knoll that the founders had invested \$2,500,000 in Sun Star. Neither of these facts were true. Mr. McCormick provided this information to Mr. Knoll knowing it to be false. The evidence shows that Mr. Knoll relied on these statements in deciding to spend \$50,000 to purchase flow-through shares, and to advise his wife Ms. Knoll to spend \$50,000 to purchase flow-through shares.

[461] For the reasons given in the analysis of Mr. Kowal's claim, the Defendants are jointly liable for the false statements made by Mr. McCormick to Mr. Knoll, and I reject the various arguments made by the Defendants to avoid liability.

[462] As a result, I find the Defendants jointly liable to Mr. Knoll for the \$50,000 loss he suffered as a result of purchasing the flow through shares in Sun Star.

Mei Choon Knoll

[463] Although she did not testify, Ms. Knoll has discharged her burden of showing that the Defendants are liable for the losses she incurred as a result of purchasing the flow through shares. I accept Mr. Knoll's evidence that Ms. Knoll relied entirely on his advice in purchasing the shares. For the reasons given above with respect to Ms. Kowal and Ms. Cutts, I find the Defendants liable for the loss suffered by Ms. Knoll in relying on advice informed by the false representations made by Mr. McCormick to Mr. Knoll.

[464] For the reasons given in the analysis of Mr. Kowal's claim, the Defendants are jointly liable for the advice given to Ms. Knoll based on Mr. McCormick's false representations to Mr. Knoll, and I reject the arguments made by the Defendants to avoid liability.

[465] The Defendants are jointly liable to Ms. Knoll for the \$50,000 loss she suffered as a result of purchasing the flow through shares in Sun Star.

Kevin Orriss

[466] Mr. Orriss has not discharged his burden of showing that the Defendants are liable for the losses he incurred as a result of purchasing the common shares and flow through shares in Sun Star.

[467] Unlike Ms. Knoll, Ms. Cutts and Ms. Kowal, Mr. Orriss did not make his investments based on the advice and direction of a third party. His situation is equivalent to that of Mr. Neil Devitt or Mr. Donald Devitt; he must present sufficient evidence of false representations having been passed on to him through Mr. Cutts, and that he relied on those false representations and suffered a loss.

[468] The evidence here is not sufficient. Mr. Orriss did not meet with the Defendants. I know that Mr. Orriss received the Investor Presentation and Business Plan. I do not, however, know what he did with those documents – whether he read them and relied on them. Mr. Donald Devitt did not read and rely on those documents even though he received them; I cannot thus assume that because Mr. Orriss received the documents, he necessarily read them. I have Mr. Cutts' evidence that he repeated to Mr. Orriss the false information he was given by the Defendants; I am not, however, satisfied based only on that evidence that that occurred. As noted earlier, I think it much more likely that someone will remember what was said to them and what information they thought was important, than that they will remember what they relayed to a third party. We do not have confirmatory testimony from Mr. Orriss. The only contemporaneous documentation about what Mr. Cutts told Mr. Orriss is the e-mail sending on the documents, and that e-mail does not repeat any of the false information given by the Defendants.

[469] I am not happy with this conclusion. Given the false information in the Investor Presentation and the Business Plan, and the importance of the information about the 4-32 well and the founders' investment to Mr. Cutts, I think it is quite possible that Mr. Orriss was given false information, that he relied upon it and that it caused his loss. But Mr. Orriss has to prove that this happened on the balance of probabilities and, in the absence of his evidence, I am not satisfied that he has done so.

Conclusion

[470] The Defendants are jointly liable to the Plaintiffs for a total amount of \$1,150,000 apportioned between the Plaintiffs as set out above.

[471] The Defendants are also liable to pay pre-judgment interest on those amounts under the *Judgment Interest Act* RSA 2000 c J-1.

[472] If the parties cannot reach an agreement as to costs, they may arrange to appear before me to speak to that issue.

Heard on the 13-17th and 20-24th days of January, and 3-6th days of March, 2020

Dated at the City of Calgary, Alberta this 8th day of April, 2020.

A. Woolley
J.C.Q.B.A.

Appearances:

Shaun MacIsaac, Q.C.
for the Plaintiffs

Bradley Minuk
for the Defendants Sun Star Energy Inc., Lester Hartland and Robert McCormick.

Sandy Rizopoulos, Self-Represented

TAB 14

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MADAM JUSTICE HUNT

BETWEEN:

GARY KELEMEN and CHRISTINE KELEMEN

Plaintiffs/Appellants
(Defendants/Appellants by Counterclaim)

- and -

CHAWKI EL-HOMEIRA and YOLLA EL-HOMEIRA

Defendants/Respondents
(Plaintiffs/Respondents by Counterclaim)

- and -

NICHOLAS RUNKA

(Not a party to Appeal)

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MADAM JUSTICE BIELBY
DATED DECEMBER 4, 1997, FILED JANUARY 19, 1998

MEMORANDUM OF JUDGMENT

COUNSEL:

R.J. Gilborn

For the Plaintiffs/Appellants
(Defendants/Appellants by Counterclaim)

M.A. Kirk

For the Defendants/Respondents
(Plaintiffs/Respondents by Counterclaim)

MEMORANDUM OF JUDGMENT

THE COURT:

- [1] A purchaser interested in buying property owned and listed by a realtor told him he needed to consult with another realtor whom he had used in the past and trusted. The vendor-realtor said he did not want the other realtor involved and said he would set up a meeting with a friend who could give the purchaser help and advice about the property. The vendor-realtor did not tell the purchaser that the person was a fellow realtor working for the same company. The purchaser met with the fellow realtor, bought the property and later discovered he had paid far too much for it. The trial judge found the vendor liable for the tort of deceit and awarded damages. The vendor appeals that decision. The purchaser appeals the damage award.

The Facts

- [2] Mr. Kelemen and his wife, the appellants, owned the property, a house situated on seven acres on a ravine in southwest Edmonton. There was a sign on it giving the name of the real estate company for whom he worked and his name. Mr. El-Homeira, one of the respondents, saw the sign and called Kelemen. El-Homeira was a restaurant owner who told Kelemen he did not read or write English. While the title to the property and the pleadings name the spouses of Kelemen and El-Homeira, it was the men who had discussions about the property, its price and potential for development.
- [3] The trial judge examined the testimony of the parties carefully because there were significant differences in the evidence on important points and credibility was critical. She rejected Kelemen's evidence where it conflicted with that of El-Homeira.
- [4] The trial judge found that during negotiations, El-Homeira made it clear to Keleman that he required advice about the merits of the purchase and specifically about the value of the property. She found that El-Homeira said that he wanted to involve Mr. Rudge, a realtor he knew and trusted. She also found that Kelemen refused to have Rudge involved. El-Homeira testified to that effect both in chief and on cross-examination. Instead, Kelemen offered to take the El-Homeiras to see a friend of his who "was a good guy and he'll help you". Kelemen then set up a meeting for El-Homeira with Mr. Runka, a realtor who worked with him. At that meeting, Runka said the property was worth over a million dollars and had greater potential value. El-Homeira did not contact Rudge and entered into the contract to purchase the property. The purchase price of \$710,000 was paid with some cash, the equity in the El-Homeira home and a mortgage back to the Kelemens. Approximately three years later, when the El-Homeiras confirmed by an appraisal that they had paid too much for the property, they ceased making mortgage payments and were sued by the Kelemens. There was evidence that, at the time of the sale, the property

had a market value of between \$450,000 and \$500,000. The El-Homeiras counterclaimed on the basis of deceit and fraudulent misrepresentation.

The Law

- [5] There are two bases upon which liability could be founded in this case, namely, on the tort of deceit or on the contract action of fraudulent misrepresentation inducing a contract. The causes of action are discrete, although they share some common features and, as the learned author Fleming says, one action tends to colour the other: J.G. Fleming, *The Law of Torts*, 9th ed. (New South Wales: LBC Information Services, 1998) at 695. The tort action is founded in law whereas the contract action is based in equity. The difference affects the remedies and defences. Either can be the basis for a claim for damages but it is only the contract action that allows rescission. The duty to mitigate is relevant to both.
- [6] In this case, although misrepresentation (including innocent and negligent) was discussed, the trial judge said she was basing liability on “deceit” and her analysis is consistent with the tort action. It is important that this court not confuse the two and that it not critically analyze the trial decision on a different legal basis from that upon which it was made.
- [7] The legal requirements for the tort of deceit come from the case of *Pasley v. Freeman* (1789), 3 T.R. 51. Salmond, in his text, *Salmond and Heuston on The Law of Torts*, 19th ed. (London: Sweet & Maxwell, 1987) describes, at p. 434, four main elements of the tort:
- (1) there must be a false representation of fact;
 - (2) the representation must be made with knowledge of its falsity;
 - (3) it must be made with the intention that it should be acted on by the plaintiff...in a manner which resulted in damage to him;
 - (4) it must be proved that the plaintiff has acted upon the false statement, and has sustained damage by doing so.
- [8] The learned author also discusses materiality in the tort of deceit. He states at p. 439:

“Materiality”

If the statement is actually relied on, it is no defence that the plaintiff was negligent or foolish in doing so, or that he had a full opportunity of discovering the truth for himself. Consent is no defence. Every man has in law a right to believe and act on all lies told him by others with intent to deceive him. Nor is it any defence to say that the representation is not “material”, or would not have induced a reasonable man. The true question is whether the statement was a real

inducement to the plaintiff: a representation may be material as between the parties, though not to a normal man. (Footnotes not reproduced)

[Emphasis added]

- [9] In discussing reliance and materiality the learned authors of the text Clerk & Lindsell on Torts, 17th ed. (London: Sweet & Maxwell, 1995) state at p. 732:

Reliance and materiality

Reliance is an essential ingredient of the tort. However, as contributory negligence is inapplicable, it is no defence that the plaintiff had a full opportunity of discovering the truth for himself. It is thus no defence to claim that the representation is not material in the sense that it would not have induced a reasonable person to so act. The question is simply whether the representation was relied upon by this plaintiff. (Footnotes not reproduced)

[Emphasis added]

- [10] In other words, when dealing with the tort of deceit, the appropriate test to measure the materiality of the representation and reliance on it is a subjective not an objective test.

The Tort of Deceit and the Facts

- [11] Applying the four elements of the tort of deceit to the facts as found by the trial judge, it is clear that she made no error in basing liability on this ground.

(1) False representation of fact

- [12] The trial judge found that Kelemen represented that Runka was a reliable, independent expert without disclosing that he worked for the same employer.

(2) The representation was made with knowledge of its falsity

- [13] The trial judge found that Kelemen made the representation knowingly. He well knew Runka was a co-employee and could not have believed he was independent. Further, she found that Kelemen knew that Runka was not an independent adviser.

(3) The representation was made with the intention it be acted on in the manner which resulted in the damage

- [14] The trial judge found that Kelemen offered Runka only to forestall El-Homeira seeking an independent assessment from his trusted, usual realtor, Rudge. It was an intentional diversion of El-Homeira to someone who was not independent.

(4) The person to whom the representation was made acted on it and sustained damage

- [15] The trial judge found that El-Homeira did not understand that Runka was not an independent voice and relied on the representation that he would be. The action taken by El-Homeira that is the basis for the tort was that he did not seek the independent advice of Rudge. The consequence of failing to obtain independent advice was that the El-Homeiras were persuaded, by the non-independent advice, to make a decision from which they suffered a loss. That loss came as a consequence of entering into a contract to purchase the property.
- [16] In the result, the trial judge concluded that there was liability on the basis of deceit.

The Basis for the Appeal

- [17] The appellants allege a palpable and overriding error in the findings of fact by the trial judge. It is clear from the reasons that the trial judge had some difficulty with the evidence given by Kelemen and thus with his credibility. We see no basis for interference with her decision in this regard.
- [18] The appellants challenge only one aspect of the application of the law of the tort of deceit to the facts. They allege that the trial judge misdirected herself with respect to the issue of materiality. However, the cases and authorities relied upon by the appellants all refer to the contract action where there is a test of materiality that does not exist in the tort action. See the memorandum of judgment of this court in *TWT Enterprises Ltd. v. Westgreen Developments* (1992), 3 Alta. L.R. (3d) 124 (C.A.); G.H.L. Fridman, *The Law of Contract*, 3rd ed. (Toronto: Carswell, 1994) at p. 293, and Di Castri, *Law of Vendor and Purchaser*, (Calgary: Carswell, 1998) at p. 7-14.
- [19] In the contract action, it is a requirement that the representation be relevant or material to *the substance of the contract*. There is authority that, generally, that test is an objective one. But in the tort action the test for materiality is, as Salmond described, a subjective one and asks the true question, namely, *whether the statement was a true inducement to the plaintiff*, in this case El-Homeira. As the learned author goes on to say: *A representation may be material as between the parties, though not to a normal man: supra.*
- [20] A critical question is: What was the action taken? In a fraudulent misrepresentation action it must be entering into a contract. In a tort action, that may be, but need not be, the action. Here the intention of Kelemen was to divert El-Homeira from consulting Rudge. He succeeded because El-Homeira's action was to consult Runka, who was not an independent advisor, instead of the independent adviser he wanted and required, Rudge.

While it is true that he also entered into the contract, that fact is irrelevant in the tort action, although it would be critical in the contract action.

- [21] Put briefly, the appellant challenges the analysis of the trial judge as if the basis for liability was contract, not tort.
- [22] The trial judge made no error in using a subjective test to measure whether the representation that Runka was an independent adviser and whether the resultant diversion from the independent adviser was material and a real inducement to El-Homeira. The real question was not whether the representation would have caused a reasonable person to act but whether it was a real inducement to El-Homeira and whether he relied on it. The trial judge's analysis and conclusions on materiality and reliance are well supported by her findings of fact.
- [23] Had liability been founded on the fraudulent representations by Runka as to value or development potential, then it would have been relevant to look at whether statements as to those topics would, to the reasonable person, be material to the substance of the contract.
- [24] The appellant raised two other challenges. The first had to do with the timing of the misrepresentation; the second was an allegation that since El-Homeira was not actively prevented from contacting Rudge, he was precluded from recovery.
- [25] As to the first, the trial judge found that El-Homeira's requirement for independent advice arose during negotiations and the diversion to Runka took place before the parties had reached an agreement. While it is not clear that timing is as relevant in the tort action as the contract action, the trial judge's finding is a complete answer.
- [26] As to the second, the complete answer to the suggestion that El-Homeira should, and could, have consulted Rudge is contained in the quotation from Salmond set out above. Put shortly, he did not have to do so, and a failure to do so, does not preclude his recovery. Further, contributory negligence is not applicable in the deceit action.
- [27] The appellants have raised a number of other grounds in this appeal, including improper pleadings, failure to apply a proper standard of proof and no basis upon which to find liability on the part of Kelemen's wife.
- [28] A review of all the pleadings, including the statement of defence filed by the El-Homeiras and their counterclaim, supports a conclusion that they were adequate and that the appellants were certainly not unaware of the basis for the claim in deceit, nor taken by surprise.

- [29] While there is no third standard of proof and the civil standard of proof is applicable to this case, it is well-established that deceit or fraud must be supported by clear and convincing evidence. The thorough and careful analysis of the trial judge shows that she was aware of the seriousness of the finding of deceit. While concluding there was deceit because of the intentional diversion, she rejected a number of grounds as not meeting the standard of proof required. There is no error relative to the standard of proof.
- [30] The record shows an accord between counsel that the failure of the spouses of Kelemen and El-Homeira to testify would not prejudice the position of either. It does not lie in the mouth of counsel to now seek to have an interpretation of the accord between counsel such that one of the appellants (for Mrs. Kelemen is on the record with Mr. Kelemen) is now declared immune from liability. In respect to both men, the wives apparently took no active role but were carried along on the record because they were parties whose names appeared on the title to the property. There is no merit in the appellants' argument on this ground.
- [31] The last ground of challenge is the failure by the El-Homeiras to mitigate their loss. There is a duty to mitigate, and it is proper to assess whether losses suffered by the El-Homeiras could have been reasonably avoided: G.H.L. Fridman, *The Law of Torts in Canada* (Toronto: Carswell, 1989) at p. 405. It is elementary that the duty to mitigate arises only when the deceit or fraud is discovered.
- [32] The trial judge found that by the time the El-Homeiras discovered the value of the land, it was too late to seek rescission in a contract action because properties involved in the trade-in had been sold to third parties. The appellants' suggestion that the lawyer hired by the El-Homeiras was a potential source of advice about the market value of the land is without merit. Thus there is no factual basis for concluding that the El-Homeiras did not act reasonably or that they failed to mitigate their loss.
- [33] On their cross appeal, the El-Homeiras raise a number of issues. In view of our decision on the main appeal, we need deal only with one. The El-Homeiras say that the trial judge erred in her assessment of damages. On this issue, the trial judge had the evidence of two experts who did not agree; in addition, during the trial she heard evidence from the various parties on the value and potential of the property. It was within the discretion of the trial judge to evaluate the conflicting expert evidence and accept only portions of it. This court is not about to second-guess her decision. She made no reviewable error in assessing damages.
- [34] In the result, we dismiss both the appeal and the cross-appeal.
- [35] The respondents, the El-Homeiras, shall have costs of the appeal but not for their factum which was filed late. Rule 538(4). Their costs need not be reduced because of their cross-appeal which did not extend the appeal significantly.

APPEAL HEARD on September 8, 1999

MEMORANDUM FILED at EDMONTON, Alberta,
this 9th day of November, 1999

PICARD J.A.

CÔTÉ J.A.

HUNT J.A.

TAB 15

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario v. Madan, 2023 ONCA 18

DATE: 20230111

DOCKET: C70480

Doherty, Feldman and Trotter JJ.A.

BETWEEN

His Majesty the King in Right of Ontario

Plaintiff/Defendant by Counterclaim/Moving Party (Respondent)

and

Sanjay Madan (a.k.a. Sadanand Madan), Shalini Madan, Chinmaya Madan,
Ujjawal Madan, Intellisources Inc., Newgen Solutions Inc., 10583570 Canada
Ltd., 1846932 Ontario Inc., Vidhan Singh, Wang & Associates Professional
Corporation, AVPS Holdings Inc., AVPS Recruiting Inc., AVPS Investments Inc.,
AVPS Properties Inc., 2305509 Ontario Inc., 1784357 Ontario Inc. and 6875459
Canada Inc.

Defendants/Plaintiffs by Counterclaim/Responding Parties (Appellants)

Christopher Du Vernet and Carlin McGoogan, for the appellants

Christopher Wayland and Andrea Huckins, for the respondent

Heard: November 17, 2022

On appeal from the order of Justice Cory A. Gilmore of the Superior Court of
Justice, dated March 10, 2022, with reasons reported at 2022 ONSC 1538.

Doherty J.A.:

A. OVERVIEW

[1] This is an appeal from an order made on a pleadings motion.

[2] The respondent, His Majesty the King in Right of Ontario (“Ontario”), sued Sanjay Madan (“Sanjay”), his wife, Shalini Madan (“Shalini”), and his two sons, Chinmaya Madan (“Chinmaya”) and Ujjawal Madan (“Ujjawal”). Shalini, Chinmaya and Ujjawal are the appellants on this appeal. The Crown alleged that Sanjay, using his senior IT position at the Ontario Ministry of Education (the “Ministry”), defrauded Ontario of millions of dollars. Ontario further alleged that Shalini, Chinmaya and Ujjawal were complicit in, and/or beneficiaries of the fraud.¹

[3] Ontario alleged two distinct fraudulent schemes. One scheme targeted the Support for Families Program (“SFFP”), administered by the Ministry. That program was commenced in April 2020 to help Ontario families with the costs associated with the at-home learning necessitated by the pandemic. The program provided for grants of \$200 to \$250 per student. Applications could be made to the Ministry using a simple online process. Sanjay helped develop the computer applications for the program.

[4] Ontario alleged that between April 2020 and August 2020, Sanjay and the appellants made thousands of fraudulent applications under the SFFP using

¹ Ontario also sued companies controlled by Sanjay. Neither Sanjay, nor his companies, have appealed from the motion judge’s order. There is also a group of defendants referred to as the “Singh defendants”. They did not take part in the motion and are not parties to this appeal.

fictitious names. The applications were approved and funds paid into one of the over 2,500 bank accounts opened by Sanjay in his name or the names of the appellants. The Crown alleged that payments in excess of \$10,800,000 were made into those accounts as a result of the fraudulent applications.

[5] The second fraudulent scheme alleged that Sanjay had been paid kickbacks by consultant vendors who obtained fee-for-service contracts with the Ministry. Sanjay was the person responsible for selecting the vendors and signing off on the consultants' timesheets. Ontario alleged that the kickback scheme had been going on for at least ten years.

[6] Ontario did not allege that the appellants actually participated in the kickback scheme. Ontario did allege that Sanjay diverted the proceeds, direct and indirect, from the kickback scheme to himself and to the appellants, either by way of money payments, or by way of property or other assets obtained from the proceeds of the kickback scheme. Ontario alleged that Sanjay and the appellants were unjustly enriched at Ontario's expense.

[7] In the Amended Amended Statement of Claim (the "Statement of Claim"), Ontario alleged fraud, theft and conversion against the appellants. Ontario sought:

- damages;
- a constructive trust over all monies obtained from the frauds and any assets acquired with money obtained from the frauds;

- an accounting of, and restitution of, all funds obtained from the frauds;
- a tracing order; and
- a *Mareva* injunction.

[8] Sanjay and the appellants are all represented by the same lawyer. However, they filed separate statements of defence. In his Statement of Defence, Sanjay denied “each and every allegation” in the Statement of Claim. Sanjay also denied that the appellants had any knowledge of, or anything to do with the frauds.²

[9] In addition to denying any knowledge of, or involvement in the frauds, Sanjay pled that Ontario was primarily responsible for any losses it had suffered. Among other things, Sanjay alleged that Ontario hired incompetent employees, failed to use appropriate hardware and software safeguards, and failed to take proper steps to guard against unscrupulous employees, presumably including himself, who exploited the inadequacies in the procedures established by Ontario to process applications for payments under the SFFP. Sanjay specifically pled that Ontario’s conduct made it contributorily negligent to any losses Ontario had suffered as a result of the frauds. He pled:

Insofar as the Plaintiff [Ontario] was contributorily negligent, its damages, if any, ought to be reduced by the degree of its proportionate fault.

² Sanjay subsequently admitted under oath that he had committed the frauds. His Statement of Defence was not changed to reflect his admission.

[10] Sanjay did not counterclaim against Ontario.

[11] The appellants denied any knowledge of, or involvement in, the fraudulent schemes in their statements of defence. Like Sanjay, the appellants pled Ontario was contributorily negligent in that it failed to take reasonable steps to prevent and limit the frauds perpetrated by Sanjay. They claimed that Ontario's damages should be reduced to reflect Ontario's responsibility for the frauds.

[12] Sanjay's sons not only denied any involvement in the fraudulent schemes, but also pled that their father had admitted to them that, without their knowledge or consent, he had deposited proceeds from the SFFP fraud into bank accounts in their names that he had opened for that purpose. Sanjay's wife also pled that she was a victim of Sanjay's identity theft, fraud, and "wrongful acts". Despite these allegations, the appellants did not crossclaim against Sanjay.

[13] The appellants did, however, counterclaim against Ontario. In essence, the counterclaims alleged that Ontario, as a result of the dishonesty, negligence and ineptitude of its employees, and the inadequacy of its computer systems, was largely responsible for any losses resulting from the frauds. The appellants claimed that several named employees of Ontario had engaged in various dishonest or negligent acts that had resulted in damage to the appellants. The counterclaims further alleged that Ontario, as Sanjay's employer, was vicariously liable for his "wrongful acts" including his invasion of the appellants' privacy through his use of

their private information to open fraudulent bank accounts in their names into which he directed the proceeds of the SFFP fraud.

[14] Ontario moved to strike parts of the statements of defence, including the contributory negligence defences advanced by the appellants. Ontario also moved to strike the counterclaims in their entirety, with the exception of a wrongful dismissal claim made by Shalini. The motion judge accepted the Crown's arguments and struck the contested parts of the statements of defence and the counterclaims. The motion judge also refused leave to amend the pleadings.

[15] The three appellants appealed from the order of the motion judge. Sanjay does not appeal.

[16] At the end of oral argument, the court advised the parties that the appeal was dismissed with reasons to follow. In the reasons below I explain why the court has concluded the motion judge properly struck the pleadings in issue and did not err in the exercise of her discretion when she refused to grant leave to amend the pleadings.

B. ISSUES AND ANALYSIS

[17] The appellants raised four issues on appeal. They submitted that the motion judge erred in striking:

- the contributory negligence defences;

- the claims in the statements of defence and counterclaims relating to Ontario's alleged misuse of the *Mareva* injunction;
- the allegation in the counterclaims that Ontario was vicariously liable for Sanjay's invasion of the appellants' privacy; and
- the allegations in the counterclaims that Ontario was either directly or vicariously liable to the appellants in negligence.

(i) The contributory negligence defence

[18] The contributory negligence defence advanced by the appellants is predicated on Ontario's alleged failure to take adequate steps to protect itself from the fraud perpetrated against it. The defence, as framed in the statements of defence, applies to all of the claims advanced by Ontario, including the fraud, theft, and conversion claims: see e.g., Shalini's Statement of Defence, at paras. 30-33, 35.

[19] The proposition that a fraudster's liability for damages flowing from its fraud should be reduced to reflect a victim's failure to protect itself from the fraud would, if accepted, strongly suggest that if perpetrated against the right victim, crime would indeed pay. Thankfully the law is to the contrary. As the motion judge held, a victim's negligence or carelessness affords no defence, partial or otherwise, to an allegation of dishonesty: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at paras. 67-71; *Man*

Financial Canada Co. v. Keuroghlian, 2008 ONCA 592, 47 B.L.R. (4th) 190, at paras. 44-46.

[20] In argument, the appellants submitted that the “contributory negligence” allegations, presented as a partial defence, targeted Ontario’s unjust enrichment claim and not the fraud claims. The appellants submitted that the many references to “contributory negligence” in the statements of defence and counterclaims are actually intended to invoke the equitable doctrine of “clean hands”, although that phrase is not used in the pleadings. The appellants argued that Ontario’s failure to take reasonable steps to protect itself and others from the frauds constituted “misconduct”, which is properly taken into account when deciding whether Ontario should be entitled to equitable relief by way of its unjust enrichment claim. In oral argument, counsel limited this submission to Ontario’s claim to assets that are allegedly the indirect proceeds of the frauds and did not maintain the appellants were entitled to keep any of the money that was the actual direct proceeds of the frauds.

[21] To establish unjust enrichment, Ontario must show, first, an enrichment of the appellants, second, a corresponding deprivation of Ontario and, third, an absence of a juristic reason for the enrichment: *Garland v. Consumers’ Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30. The appellants contend that even if Ontario establishes the requisite criteria, the appellants are entitled to keep at

least some of the indirect proceeds of fraud because Ontario failed to take proper steps to protect itself from fraud.

[22] The appellants' position is untenable in law. I am unaware of any case which suggests that a plaintiff's carelessness or negligent conduct can demonstrate the kind of moral turpitude required to justify invoking the "clean hands" doctrine to deny what would otherwise be appropriate equitable relief based on unjust enrichment.

[23] The appellants rely on *Love v. Turf Management Systems Inc.* (1997), 38 B.L.R. (2d) 70 (Ont. Gen. Div.). The appellants submit that in *Love*, the application judge found, based on negligence, that a party did not have "clean hands". While it is true that the phrase "clean hands" appears in the reasons at para. 10, *Love* has nothing to do with either unjust enrichment claims or the kind of misconduct that can bar access to equitable relief.

[24] In *Love*, the franchisee breached its franchise agreement. The franchisor had the right to terminate the franchise agreement and moved to do so. The franchisee sought relief from forfeiture of the agreement under s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. In denying that relief, the application judge referred to the usual factors relevant on a motion for relief from forfeiture, including the nature of the breach of the contract which precipitated the franchisor's right to terminate the agreement. The application judge pointed out that the breach was

not premised on “mistake, surprise or accident”, but rather on “forgetfulness or perhaps negligence”: *Love*, at para. 7. After a review of the relevant factors, the application judge concluded, at para. 11, that the franchisee had not made out a case for relief from forfeiture. *Love* is of no relevance here.

[25] Apart from the state of the case law, the appellants’ claim fails on a first principles analysis. The appellants maintain that even if they are in possession of assets that are the indirect proceeds of the frauds perpetrated against Ontario, and even though the appellants have no legitimate claim to any part of the proceeds of those frauds, they should be entitled to keep the assets, or at least part of the assets, which are the indirect proceeds of the fraud, presumably to “punish” Ontario for not taking adequate steps to protect itself from the fraud.

[26] On this approach, the appellants become the beneficiaries of what can only be described as a windfall, occasioned by Ontario’s failure to protect itself from Sanjay’s fraud. I am unaware of any equitable principle which justifies this result. Indeed, the result, a permanent financial loss for Ontario, the victim of the fraud, and a windfall gain for the appellants, bystanders to the fraud, seems the antithesis of equity.

(ii) The allegations in the statements of defence and counterclaim relating to the *Mareva* injunction and preservation order

[27] In October 2020, Ontario obtained an *ex parte Mareva* injunction and a preservation order under the *Civil Remedies Act, 2001*, S.O. 2001, c. 28. The appellants subsequently consented to the continuation of the *Mareva* injunction and the preservation order.

[28] In their statements of defence and counterclaims, the appellants alleged that Ontario “seized or froz[e]” funds to which Ontario “has no entitlement”. The appellants further alleged that Ontario “abused the authority it obtained from this Honourable Court” when it seized or froze those funds. These allegations are presumably references to steps taken by Ontario pursuant to the authority granted by the *Mareva* injunction and preservation order. The appellants also allege that they are entitled to damages based on the undertaking given by Ontario as a term of the granting of the *Mareva* injunction.

[29] The pleadings relating to the *Mareva* injunction and preservation order were properly struck for several reasons. First, the appellants have not pled any material facts capable of supporting the claim that Ontario “froze” funds. Presumably, they pled no such facts because, as is self-evident, funds were frozen by court orders and not by any action of Ontario.

[30] Second, there is no allegation that any of the funds frozen by court order were frozen in violation of the terms of those orders. The appellants make no reference in the counterclaims to any of the specific terms of the *Mareva* injunction or preservation order.

[31] Counsel’s submission that the allegations in the statements of defence and counterclaims to the effect that the seized funds were “never taken from the Plaintiff” and were funds to which “the Plaintiff has no entitlement”, constitute allegations that the injunction was improperly obtained and/or executed has no merit. *Mareva* injunctions are not necessarily limited to property “taken from the Plaintiff” or property to which “the Plaintiff has no entitlement”. Without any reference in the pleadings to the actual terms of the *Mareva* injunction or preservation order, there is no basis upon which the appellants can plead that the seizures were in contravention of the terms of the orders.³ Furthermore, having consented to the orders being made, the appellants are hard pressed to plead that the orders were improperly made.

[32] Finally, the appellants’ bald claims that Ontario “abused the authority it obtained from this Honourable Court” and that Ontario “simply grabbed all the

³ The *Mareva* injunction and preservation order were filed as part of the appeal record. Not surprisingly, the terms of those orders are not limited to property taken from Ontario, or property to which Ontario has some entitlement.

money it could find” were properly struck as entirely unsupported by any material facts in the appellants’ pleadings.

[33] The allegations in the appellants’ statements of defence and counterclaims in respect of the granting and execution of the *Mareva* injunction and preservation order were properly struck. If it should ultimately develop that the orders were improperly granted or executed, the appellants may, of course, call upon Ontario to fulfill its undertaking to abide by any order the court might make with respect to damages arising from the granting and enforcement of the orders.

(iii) The intrusion upon seclusion claim

[34] In their counterclaims, the appellants pled that by giving Sanjay access to its computer networks, failing to install the appropriate systems and safeguards, and failing to heed various warnings about misuse of the SFFP, Ontario provided Sanjay with the opportunity and means to commit “identity theft and fraud”. The appellants further contended that Sanjay used the appellants’ identities to receive payments from the SFFP. They alleged that Ontario was vicariously liable for Sanjay’s “wrongful acts” and for his intrusion upon the seclusion of the appellants. The allegations in para. 97 of Chinmaya’s Statement of Defence and Counterclaim are typical of the pleading made with respect to intrusion upon seclusion:

In such circumstances, the Plaintiff (Defendant to Counterclaim) is vicariously liable for the intrusion upon seclusion committed by its employee, Sanjay Madan....

[35] The pleadings contain no further reference to the intrusion upon seclusion claim. At no point do the pleadings draw any distinction among the terms “intrusion upon seclusion”, “identity theft”, “fraud”, or “wrongful acts”. The pleadings do not specify the exact nature of the invasion of privacy alleged by the appellants.

[36] The appellants did allege that Sanjay was the person in the family who was primarily responsible for the financial affairs of all family members. Consequently, they trusted him with their private banking information. The appellants pled that they did not know that Sanjay was misusing their personal information to open thousands of bank accounts in their names, or that he was causing the proceeds of the SFFP fraud to be deposited into those accounts. The appellants, particularly Sanjay’s sons, claimed to have been betrayed by their father.

[37] In argument, the appellants maintained that their intrusion upon seclusion claim referred not only to Sanjay’s misuse of the appellants’ private information to open fraudulent bank accounts in their names, but also to Sanjay’s causing of the proceeds of the SFFP fraud to be deposited into those accounts.

[38] The appellants no doubt frame the intrusion upon seclusion claim to include the transfer of funds into the fraudulent bank accounts in an effort to fix Ontario with vicarious liability for Sanjay’s invasion of the privacy of the appellants. However, like the motion judge, I cannot agree that the tort of intrusion upon seclusion encompasses the subsequent fraud on Ontario, perpetrated by Sanjay

when he caused Ontario to deposit funds into the accounts he had opened in the names of the appellants.

[39] The tort of invasion of privacy, or intrusion upon seclusion, is complete when the alleged tortfeasor invades or intrudes upon the private affairs or concerns of another. That invasion or intrusion must be intentional or reckless, and it must be sufficiently serious that a reasonable person would regard the invasion of privacy as highly offensive causing distress, humiliation or anguish: *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, at para. 71; *Owsianik v. Equifax Canada Co.*, 2022 ONCA 813, at paras. 53-54. The tort is complete without proof of pecuniary damage: *Jones*, at para. 71.

[40] The tort of intrusion upon seclusion seeks to protect the integrity and autonomy of one's personal information through the recognition of one's right to control access to, dissemination of, and use of one's private information by others. On the facts as pled by the appellants, their right to control access to and use of their private information was compromised by Sanjay's dishonest use of the information entrusted to him by his family members to open thousands of bank accounts as a step in furtherance of a scheme to defraud the SFFP. The use of the information to establish the accounts is clearly an infringement of the appellants' right to control their private information. The use of the bank accounts established by the misuse of the appellants' private information as depositories for the fraud perpetrated against Ontario by Sanjay did not involve any further invasion

of the appellants' privacy. The use of the private information obtained by Sanjay through the invasion of the appellants' privacy in his fraud on Ontario may have relevance to the quantification of any damages caused by Sanjay's invasion of the appellants' privacy. Pecuniary damages are not, however, an element of the tort of intrusion upon seclusion: *Jones*, at para. 71.

[41] A proper understanding of the elements of the tort of intrusion upon seclusion is essential to a determination of whether the appellants have pled a basis upon which Ontario could be vicariously liable for Sanjay's commission of that tort. Ontario could only be vicariously liable if Ontario could be said to be legally responsible for Sanjay's misuse of the appellants' private banking information to establish the false accounts as a step in his scheme to defraud Ontario.

[42] Nothing alleged in the pleadings could support a finding that Ontario should be held vicariously liable for Sanjay's invasion of the appellants' privacy. In *Bazley v. Curry*, [1999] 2 S.C.R. 534, McLachlin J. dealt at length with the nature and scope of an employer's vicarious liability for the actions of its employees. She observed, at para. 37:

Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on

employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence. [Emphasis added.]

[43] The risk that Sanjay would misuse the private banking information entrusted to him by his family was not a risk “that the employer’s enterprise creates or exacerbates.” Nor was the violation of the appellants’ privacy rights by Sanjay’s misuse of their private banking information “so connected with the employment that it can be said that the employer has introduced the risk of the wrong”. In fact, there is no connection between Sanjay’s employment with Ontario and the wrong underlying the intrusion upon seclusion claim.

[44] The appellants rely on *Evans v. Bank of Nova Scotia*, 2014 ONSC 2135, 55 C.P.C. (7th) 141, leave to appeal to Div. Ct. refused, 2014 ONSC 7249. In that case, however, the employee, in respect of whom the employer was potentially vicariously liable, had misused private customer information made available by the employer to the employee in the course of his employment. On those allegations, the employer could potentially be held vicariously liable for the employee’s use of the private information of the bank’s customers entrusted to the employee by the bank in the course of his employment with the bank. On the facts alleged here,

Ontario did not provide any information to Sanjay in respect of the private affairs of the appellants. It was the appellants who provided their private information directly to Sanjay, not because he worked for Ontario, but because, as their husband and father, they trusted him to look after their financial affairs.

[45] The claim that Ontario is vicariously liable for Sanjay's breach of his family's privacy rights in their banking information was properly struck.

(iv) The negligence claims

[46] In their counterclaims, the appellants alleged that Ontario was directly liable to the appellants in negligence. They claimed that Ontario owed them a duty of care and had failed to take appropriate steps to protect them from the negligent actions of Ontario's employees. The appellants also pled that a special relationship arose between Ontario and the appellants giving rise to a duty of care by virtue of Ontario's transfer of funds into bank accounts in the names of the appellants. They further pled that Ontario failed to take reasonable steps to guard against the risk that its employees would misuse Ministry computer systems and other facilities to defraud the appellants and commit identity theft.

[47] In addition to making a direct claim against Ontario in negligence, the appellants alleged that Ontario was vicariously liable for the negligence of its employees. In their pleadings, the appellants specifically identified by name and/or

position several employees who they claimed were negligent in the performance of their duties and whose negligence had caused damage to the appellants.

[48] In the pleadings, the appellants further alleged that Ontario was vicariously liable for the “wrongful acts” of Sanjay. The pleadings particularized those acts as fraud and identity theft. Ontario submits that the pleadings do not, however, include an allegation that Ontario is vicariously liable for Sanjay’s negligence.

[49] There is merit to this position advanced by Ontario. However, as I am satisfied the appellants have not pled a viable claim based on Ontario’s vicarious liability for the negligence of any of its employees, I will assume for the purpose of the analysis that the pleading includes an allegation that Ontario is vicariously liable for Sanjay’s negligence.

(a) Can Ontario be directly liable for negligence?

[50] The motion judge struck the claims alleging that Ontario was directly liable to the appellants in negligence. She held that under s. 8 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17 (the “Act”), the Crown could not be held directly liable in tort. The Crown could be held vicariously liable for the tortious acts of its officers, employees or agents.

[51] The relevant parts of s. 8 are set out below:

Crown liability

8(1) Except as otherwise provided under this Act or any other Act, the Crown is subject to all the liabilities in tort to which it would be liable if it were a person,

(a) in respect of a tort committed by an officer, employee or agent of the Crown;

...

Same

(2) For greater certainty, nothing in clause (1) (a) subjects the Crown to liability for a tort that is not attributable to the acts or omissions of an officer, employee or agent of the Crown.

Limitation of government actors' liability applies to the Crown

(3) The negation or limitation under an Act of the liability of an officer, employee or agent of the Crown in respect of a tort committed by him or her applies to the same extent and in the same manner with respect to the Crown, and no proceeding may be brought against the Crown in respect of an act or omission of an officer, employee or agent of the Crown if a proceeding in tort in respect of such an act or omission may not be brought against that officer, employee or agent or against his or her personal representative.

[52] The provisions in s. 8 abrogate to some extent the Crown's immunity from tort liability. Under the Act, Ontario is liable for torts committed by an officer, employee or agent of the Crown and Ontario's liability in tort extends only to acts or omissions attributable to an officer, employee or agent of the Crown. Finally, the Crown is liable in tort for an act or omission, only if a proceeding in tort in respect

of that act or omission could be brought against an officer, employee or agent of the Crown. Ontario's tort liability is vicarious and depends on the plaintiff's ability to prove the tortious conduct or omission of an officer, employee or agent of Ontario.

[53] The vicarious nature of the Crown's liability in tort under the Act is clear on a careful reading of s. 8 of the Act.⁴ Several judgments from this court have affirmed that reading: see *Walters (Litigation Guardian of) v. Ontario*, 2017 ONCA 53, 136 O.R. (3d) 53, at para. 34, leave to appeal refused, [2017] S.C.C.A. No. 100; *Ontario v. Phaneuf*, 2010 ONCA 901, 104 O.R. (3d) 392, at para. 13; *Bruno v. Dacosta*, 2020 ONCA 602, 69 C.C.L.T. (4th) 171, at paras. 33-34, leave to appeal refused, [2020] S.C.C.A. No. 412; *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498, at paras. 142-45.

[54] Despite the language of s. 8 of the Act, and the line of authority referred to above, the appellants maintain that the Crown can be directly liable in tort. In their factum, the appellants make no reference to the language of the Act but instead, refer to an authority from British Columbia, where the comparable legislation, differently worded, does permit claims directly against the Crown: see *Just v. British Columbia*, [1989] 2 S.C.R. 1228.

⁴ Similar language, to the same effect, is found in the predecessor legislation, the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 5.

[55] The appellants also misread this court's decision in *Francis*, and make no reference to the other cases cited above, in para. 53. In *Francis*, at para. 144, this court said:

On a fair reading of the amended statement of claim, it is clear that the allegations being made against Ontario arise from its vicarious liability for the negligent acts of its servants. The amended statement of claim expressly references Regulation 778, by which administrative segregation decisions are left to the individual Superintendents. It is also clear from the amended statement of claim that the negligent acts are those of servants of Ontario. [Emphasis added.]

[56] Finally, the appellants' reliance on *Aylmer Meat Packers Inc. v. Ontario*, 2022 ONCA 579, 162 O.R. (3d) 532 does not assist. Whether the Ministry of Agriculture, Food and Rural Affairs' liability was direct or vicarious was not debated in *Aylmer*. Neither the Act, nor the cases referred to above were discussed or cited in the judgment. The parties and this court treated any distinction between the Ministry of Agriculture, Food and Rural Affairs' direct liability in negligence and its vicarious liability for the actions of its employees as irrelevant to the issues addressed on the appeal.

[57] The motion judge correctly struck the negligence claims in the counterclaims to the extent they advanced a direct claim in negligence against Ontario.

(b) Can the pleading that Ontario is vicariously liable in negligence stand?

[58] The motion judge struck the claims alleging that Ontario was vicariously liable for the negligence of its employees on the ground that the appellants did not plead facts on which a relationship of proximity necessary to a finding of a duty of care could be made. The motion judge concluded that the appellants were required to plead facts which could establish the requisite proximity as between named or otherwise identified employees of Ontario and the appellants.

[59] For the reasons set out in the previous section, at paras. 50-57, I agree with the motion judge that the relationship giving rise to the requisite proximity must be one between identified officers, agents or employees of Ontario and the appellants. For the purposes of considering this submission, I include Sanjay as an identified employee of Ontario. It is only if the appellants have properly pleaded the existence of the requisite proximity between identified Crown employees and the appellants that the inquiry can properly turn to Ontario's responsibility in law for the acts or omissions of those identified employees: *Francis*, at paras. 144-45.

[60] The appellants chose not to plead the existence of any special relationship between the appellants and any identifiable officer, agent or employee of Ontario. Instead, the appellants pled a "special relationship" with Ontario. The claim fails on that ground alone.

[61] Assuming the appellants could amend their claim to allege the requisite relationship between the appellants and identified officers, agents or employees of Ontario, the negligence claim would still be properly struck. I agree with the motion judge that the mere transfer of funds into accounts in the names of the appellants could not, on its own, establish the requisite proximity between the appellants and any employee, officer or agent of Ontario.

[62] The appellants do not claim that the requisite proximity arose out of any statutory provision. They rely exclusively on “interactions between the claimant and the government”: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 43. On the pleadings, the transfer of the funds into the accounts in the names of the appellants is the only interaction relied on by the appellants to establish proximity.

[63] It was central to the appellants’ defence as pleaded that they had no knowledge of the existence of the vast majority of accounts Sanjay had opened in their names, and no control over, or access to, any of those accounts. For example, Shalini specifically pled that she had no knowledge of any of the accounts in her name that were used for the purposes of the SFFP fraud until some time after this lawsuit began. Even in respect of the accounts that the appellants had opened themselves, they had no knowledge of, or any control over, the transfer of any funds into those accounts under the SFFP.

[64] In addition to pleading they had no knowledge of the vast majority of the accounts, and no knowledge of any transactions in the accounts, the appellants also did not plead any communication or any other form of contact, direct or indirect, with any employee, officer or agent of Ontario in respect of those accounts. Nor did the appellants claim any involvement in, or knowledge of, the SFFP applications that generated the funds deposited into the accounts. Finally, as I understand the appellants' position as advanced in argument, they do not claim any entitlement, or interest in any of the funds transferred into those accounts under the auspices of the SFFP.

[65] On the pleadings, there is nothing that could reasonably be described as an "interaction" between the appellants and Ontario. The appellants' claim to a special relationship arising exclusively out of the transfer of funds into accounts in their names by Sanjay as part of the fraud comes down to the assertion that Sanjay's fraudulent scheme created a special relationship between the appellants, the victims of his identity theft, and Ontario, the victim of his fraud. The mere fact that Ontario and the appellants were both cheated by Sanjay as part of the same scheme cannot create a "special relationship" giving rise to a duty of care owed to the appellants by any officer, agent or employee of Ontario.

[66] The motion judge properly struck the negligence claims advanced in the counterclaims.

**C. SHOULD THE APPELLANTS HAVE BEEN GRANTED LEAVE TO
AMEND THEIR PLEADINGS?**

[67] The motion judge declined to exercise her discretion and grant the appellants leave to amend their pleadings. Most of the deficiencies in the pleadings are not amenable to any possible amendment. For example, the contributory negligence defence, the counterclaims in respect of Ontario's vicarious liability for Sanjay's invasion of the appellants' privacy, and the counterclaims alleging Ontario's direct liability in negligence, are not legally tenable claims and cannot be amended.

[68] To the extent that any of the pleadings may have been capable of amendment, I would defer to the motion judge's exercise of her discretion and her refusal to permit any amendment: see *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789, 148 O.R. (3d) 115, at para. 30, leave to appeal refused, [2019] S.C.C.A. No. 409. The appellants had already amended their pleadings once, and they offered no concrete suggestions to the motion judge, or in this court, as to any appropriate amendments that could be made.

D. CONCLUSION

[69] The appeal is dismissed. The appellants accept, in light of the outcome of the appeal, that Ontario should have its costs fixed at \$35,000, inclusive of relevant disbursements and taxes. So ordered.

Released: "January 11, 2023 DD"

"Doherty J.A."
"I agree. K. Feldman J.A."
"I agree. G.T. Trotter J.A."

TAB 16

Performance Industries Ltd. and Terrance O'Connor *Appellants/Respondents on cross-appeal*

v.

Sylvan Lake Golf & Tennis Club Ltd. *Respondent/Appellant on cross-appeal*

INDEXED AS: PERFORMANCE INDUSTRIES LTD. v. SYLVAN LAKE GOLF & TENNIS CLUB LTD.

Neutral citation: 2002 SCC 19.

File No.: 27934.

2000: December 14; 2002: February 22.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Contracts — Equitable remedies — Rectification of contract — Written contract not reflecting prior oral agreement — Whether equitable remedy of rectification available — Whether lack of due diligence a bar to rectification.

Damages — Punitive damages — Written contract not reflecting prior oral agreement owing to fraud of one of parties — Whether trial judge's award of punitive damages should be restored.

The respondent operated an 18-hole golf course. The appellant O entered into negotiations with B, the respondent's principal, for a joint venture. The trial judge found that B and O made an oral agreement, which included an option on the 18th fairway for a specific residential development to be undertaken by B. During the negotiations, B discussed with O photographs and plans of a double row of houses clustered around a *cul-de-sac* along the length of the 18th fairway. When O's lawyer reduced the terms of the oral agreement to writing, the option clause accurately specified the 480-yard length of the proposed development, but instead of sufficient width to permit a double row of houses (approximately 110 yards), the clause as written allowed only enough land for a single row of houses (110 feet).

Performance Industries Ltd. et Terrance O'Connor *Appelants/Intimés au pourvoi incident*

c.

Sylvan Lake Golf & Tennis Club Ltd. *Intimée/Appelante au pourvoi incident*

RÉPERTORIÉ : PERFORMANCE INDUSTRIES LTD. c. SYLVAN LAKE GOLF & TENNIS CLUB LTD.

Référence neutre : 2002 CSC 19.

Nº du greffe : 27934.

2000 : 14 décembre; 2002 : 22 février.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Contrats — Réparations fondées sur l'équité — Rectification du contrat — Contrat écrit ne reflétant pas l'entente verbale antérieure — Y a-t-il ouverture à la réparation en équité que constitue la rectification? — Le défaut de faire montre de diligence raisonnable fait-il obstacle à la rectification?

Dommages-intérêts — Dommages-intérêts punitifs — Contrat écrit ne reflétant pas l'entente verbale antérieure en raison de la fraude commise par l'une des parties — La décision du juge du procès accordant des dommages-intérêts punitifs doit-elle être rétablie?

L'intimée exploitait un terrain de golf comptant 18 trous. L'appelant O a entamé des négociations en vue d'établir une coentreprise avec B, le propriétaire de l'intimée. Le juge de première instance a estimé que B et O avaient conclu une entente verbale, qui comportait une option visant la construction d'un complexe domiciliaire particulier par B au 18^e trou. Durant les négociations, B a examiné avec O des photographies et des plans du type de complexe qu'il envisageait, à savoir une double rangée de maisons regroupées autour d'un *cul-de-sac* le long du 18^e trou. Après que l'avocat de O a couché par écrit les termes de l'entente verbale, la clause établissant l'option mentionnait de façon précise la longueur de 480 verges du complexe proposé, mais, telle qu'elle avait été rédigée, au lieu

When B sought to exercise the option, O insisted on the written terms, despite knowing that these terms did not accurately reflect the prior oral option agreement. The respondent commenced the present action against the appellants for rectification of the agreement or damages in lieu thereof, punitive damages and solicitor-client costs. The trial judge held that the respondent was entitled to rectification of the option clause, awarding damages in lieu assessed on the basis of the loss of profit on a fully built residential development. Punitive damages were assessed at \$200,000. The Court of Appeal set aside the punitive damages award. In all other respects, the appeal was dismissed.

Held: The appeal and cross-appeal should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ.: The necessary preconditions to obtaining the equitable remedy of rectification of the contract are met in this case. First, the respondent has shown the existence and content of the prior oral agreement. There was a definite project in a definite location to which O and B had given their definite assent. Although the parties did not discuss a metes and bounds description, they were working on a defined development proposal. O's numbers (110 x 480) can be accepted, while rejecting the error created by his apparently duplicitous substitution of feet for yards in the write-up of the option clause. Second, it was found that O had fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. Third, the precise terms of rectification are readily ascertained, namely to change the word "feet" in the phrase "one hundred ten (110) feet in width" to "yards". Fourth, there is convincing proof of B's unilateral mistake and O's knowledge of that mistake. B's version of the oral agreement was sufficiently corroborated on significant points by other witnesses and documents. While as an experienced businessman, B ought to have examined the text of the option clause before signing the document, due diligence on the part of the plaintiff is not a (fifth) condition precedent to rectification. Lack of due diligence may be taken into account in the exercise of a discretion to refuse the remedy, but here lack of due

de prévoir une largeur suffisante pour permettre la construction d'une double rangée de maisons (environ 110 verges), elle ne faisait état que d'une largeur suffisante pour une seule rangée de maisons (110 pieds). Lorsque B a voulu lever l'option, O a insisté sur l'application de la convention écrite même s'il savait qu'elle ne reflétait pas fidèlement l'entente verbale antérieure concernant l'option. L'intimée a entamé contre les appelants la présente action, dans laquelle elle sollicitait soit la rectification de la Convention soit des dommages-intérêts en tenant lieu, des dommages-intérêts punitifs et les dépens sur la base procureur-client. Le juge du procès a conclu que l'intimée avait droit à la rectification de la clause relative à l'option, et il a accordé des dommages-intérêts tenant lieu de rectification, établis sur la base de la perte des profits qui auraient été réalisés par la construction complète du complexe domiciliaire. Les dommages-intérêts punitifs ont été fixés à 200 000 \$. La Cour d'appel a annulé la décision accordant les dommages-intérêts punitifs, mais elle a toutefois rejeté l'appel sur tous les autres points.

Arrêt : Le pourvoi principal et le pourvoi incident sont rejetés.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major, Binnie et Arbour : Les préalables nécessaires pour donner ouverture à la réparation en equity que constitue la rectification sont réunis en l'espèce. Premièrement, l'intimée a établi l'existence et la teneur de l'entente verbale antérieure. Il existait un projet défini et devant être réalisé à un endroit déterminé, dont O et B avaient convenu précisément. Bien que les parties n'aient pas discuté de la description technique des lieux, elles travaillaient à un projet d'aménagement défini. Il est possible d'accepter les chiffres inscrits par O (110 x 480), tout en écartant l'erreur créée par sa substitution apparemment frauduleuse, relativement à une des dimensions, d'une mesure en pieds à une mesure en verges dans la rédaction de la clause relative à l'option. Deuxièmement, il a été jugé que O avait fait une assertion inexacte et frauduleuse en laissant croire que l'écrit reflétait fidèlement les conditions prévues par l'entente verbale antérieure. Troisièmement, la façon précise par laquelle l'écrit doit être rectifié est facile à déterminer : Il s'agit de remplacer le mot « pieds » par le mot « verges » dans la phrase « cent dix (110) pieds de largeur ». Quatrièmement, il existe une preuve convaincante de l'erreur unilatérale de B et de la connaissance par O de cette erreur. La version donnée par B de l'entente verbale était suffisamment corroborée sur des aspects importants par d'autres témoins ainsi que par des documents. Bell, en tant qu'homme d'affaires expérimenté, aurait dû examiner le texte de la clause

diligence was offset by the finding of fraud against O, and rectification was therefore properly granted.

In the absence of an error of principle, or a factual record that supports the appellants' criticisms, the findings in the courts below on the amount of compensatory damages must stand. Damages for breach of the contract, as rectified, include losses flowing from the special circumstances known to the parties at the time they made their contract.

The award of punitive damages in this case should not be restored as it does not serve a rational purpose. Only in exceptional cases does tort attract punitive damages. An award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation. In this case, neither the making of a punitive damages award nor the \$200,000 assessment meets the test of rationality.

Per LeBel J.: Subject to the comments on punitive damages in *Whiten*, the majority reasons were agreed with. Rectification of the contract was properly ordered, but punitive damages would fulfill no rational purpose in this case.

Cases Cited

By Binnie J.

Applied: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18; **referred to:** *Hart v. Boutilier* (1916), 56 D.L.R. 620; *Ship M. F. Whalen v. Pointe Anne Quarries Ltd.* (1921), 63 S.C.R. 109; *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29; *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9; *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257; *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11; *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351; *Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354; *I.C.R.V. Holdings*

relative à l'option avant de signer le document, mais la diligence raisonnable de la part du demandeur n'est pas un (cinquième) préalable au prononcé d'une ordonnance de rectification. L'absence de diligence raisonnable peut être prise en compte dans l'exercice du pouvoir discrétionnaire de refuser la réparation en question, mais en l'espèce cette omission est contre balancée par la conclusion de fraude prononcée contre O, et la rectification a donc été accordée à bon droit.

En l'absence d'erreur de principe ou d'éléments factuels qui appuieraient les critiques formulées par les appelants, les conclusions des juridictions inférieures sur le montant des dommages-intérêts compensatoires doivent être confirmées. Les dommages-intérêts accordés pour la rupture du contrat rectifié doivent par conséquent inclure les pertes découlant des circonstances particulières connues des parties au moment où elles ont conclu le contrat.

La décision d'accorder des dommages-intérêts punitifs en l'espèce ne doit pas être rétablie puisqu'elle ne sert aucun objectif rationnel. Ce n'est que dans des circonstances exceptionnelles qu'un délit civil commande des dommages-intérêts punitifs. Une décision accordant des dommages-intérêts punitifs n'est rationnelle que « si, mais seulement si » les dommages-intérêts compensatoires ne permettent pas de donner effet adéquatement aux objectifs de châtement, de dissuasion et de dénonciation. En l'espèce, ni la décision accordant des dommages-intérêts punitifs ni la somme de 200 000 \$ accordée à ce titre ne satisfont au critère de la rationalité.

Le juge LeBel : Sous réserve des commentaires exposés sur la question des dommages-intérêts punitifs dans l'arrêt *Whiten*, il y a accord avec les motifs de la majorité. C'est à juste titre que la rectification du contrat a été ordonnée, mais des dommages-intérêts punitifs ne serviraient aucune fin rationnelle dans la présente affaire.

Jurisprudence

Citée par le juge Binnie

Arrêt appliqué : *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18; **arrêts mentionnés :** *Hart c. Boutilier* (1916), 56 D.L.R. 620; *Ship M. F. Whalen c. Pointe Anne Quarries Ltd.* (1921), 63 R.C.S. 109; *Downtown King West Development Corp. c. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550; *Lamb c. Kincaid* (1907), 38 R.C.S. 516; *First City Capital Ltd. c. British Columbia Building Corp.* (1989), 43 B.L.R. 29; *McMaster University c. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9; *Montreal Trust Co. c. Maley* (1992), 99 D.L.R. (4th) 257; *Alampi c. Swartz* (1964), 43 D.L.R. (2d) 11; *Stepps Investments Ltd. c. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351; *Augdome Corp. c. Gray*, [1975] 2 R.C.S. 354;

Ltd. v. Tri-Par Holdings Ltd. (1994), 53 B.C.A.C. 72; *Gordeyko v. Edmonton* (1986), 45 Alta. L.R. (2d) 201; *Kerr v. Cunard* (1914), 16 D.L.R. 662; *Byrnlea Property Investments Ltd. v. Ramsay*, [1969] 2 Q.B. 253; *Rumble v. Heygate* (1870), 18 W.R. 749; *Bloom v. Averbach*, [1927] S.C.R. 615; *Beverly Motel (1972) Ltd. v. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757; *Big Quill Resources Inc. v. Potash Corp. of Saskatchewan* (2001), 203 Sask. R. 298; *Prince Albert Credit Union v. Diehl*, [1987] 4 W.W.R. 419; *Windjammer Homes Inc. v. Generation Enterprises* (1989), 43 B.L.R. 315; *Farah v. Barki*, [1955] S.C.R. 107; *May v. Platt*, [1900] 1 Ch. 616; *Central R. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99; *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322; *Dalon v. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89; *Brown & Root Ltd. v. Chimo Shipping Ltd.*, [1967] S.C.R. 642; *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670; *Burrard Drydock Co. v. Canadian Union Line Ltd.*, [1954] S.C.R. 307; *Corbin v. Thompson* (1907), 39 S.C.R. 575; *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633; *New Horizon Investments Ltd. v. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268; *Kinkel v. Hyman*, [1939] S.C.R. 364; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

By LeBel J.

Referred to: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18.

Authors Cited

American Law Institute. *Restatement of the Law, Second: Contracts (2d)*, vol. 1. St. Paul, Minn.: American Law Institute Publishers, 1981.

Fridman, Gerald Henry Louis. *The Law of Contract in Canada*, 4th ed. Scarborough, Ont.: Carswell, 1999.

Spencer Bower, George, and Alexander Kingcome Turner. *The Law of Actionable Misrepresentation*, 3rd ed. London: Butterworths, 1974.

Waddams, Stephen M. *The Law of Contracts*, 4th ed. Toronto: Canada Law Book, 1999.

APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (2000), 255 A.R. 329, 185 D.L.R. (4th) 269, 6 B.L.R. (3d) 24, [2000] A.J. No. 408 (QL), 2000 ABCA 116, setting aside the punitive damages award but dismissing the appellants' appeal in all other respects from a judgment of the Court of Queen's Bench (1999), 246 A.R. 272, 49 B.L.R. (2d) 284,

I.C.R.V. Holdings Ltd. c. Tri-Par Holdings Ltd. (1994), 53 B.C.A.C. 72; *Gordeyko c. Edmonton* (1986), 45 Alta. L.R. (2d) 201; *Kerr c. Cunard* (1914), 16 D.L.R. 662; *Byrnlea Property Investments Ltd. c. Ramsay*, [1969] 2 Q.B. 253; *Rumble c. Heygate* (1870), 18 W.R. 749; *Bloom c. Averbach*, [1927] R.C.S. 615; *Beverly Motel (1972) Ltd. c. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757; *Big Quill Resources Inc. c. Potash Corp. of Saskatchewan* (2001), 203 Sask. R. 298; *Prince Albert Credit Union c. Diehl*, [1987] 4 W.W.R. 419; *Windjammer Homes Inc. c. Generation Enterprises* (1989), 43 B.L.R. 315; *Farah c. Barki*, [1955] R.C.S. 107; *May c. Platt*, [1900] 1 Ch. 616; *Central R. Co. of Venezuela c. Kisch* (1867), L.R. 2 H.L. 99; *United Services Funds (Trustees of) c. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322; *Dalon c. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89; *Brown & Root Ltd. c. Chimo Shipping Ltd.*, [1967] R.C.S. 642; *General Securities Ltd. c. Don Ingram Ltd.*, [1940] R.C.S. 670; *Burrard Drydock Co. c. Canadian Union Line Ltd.*, [1954] R.C.S. 307; *Corbin c. Thompson* (1907), 39 R.C.S. 575; *Asamera Oil Corp. c. Sea Oil & General Corp.*, [1979] 1 R.C.S. 633; *New Horizon Investments Ltd. c. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268; *Kinkel c. Hyman*, [1939] R.C.S. 364; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130.

Citée par le juge LeBel

Arrêt mentionné : *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18.

Doctrine citée

American Law Institute. *Restatement of the Law, Second: Contracts (2d)*, vol. 1. St. Paul, Minn. : American Law Institute Publishers, 1981.

Fridman, Gerald Henry Louis. *The Law of Contract in Canada*, 4th ed. Scarborough, Ont. : Carswell, 1999.

Spencer Bower, George, and Alexander Kingcome Turner. *The Law of Actionable Misrepresentation*, 3rd ed. London : Butterworths, 1974.

Waddams, Stephen M. *The Law of Contracts*, 4th ed. Toronto : Canada Law Book, 1999.

POURVOI PRINCIPAL et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (2000), 255 A.R. 329, 185 D.L.R. (4th) 269, 6 B.L.R. (3d) 24, [2000] A.J. No. 408 (QL), 2000 ABCA 116, qui a annulé la décision accordant des dommages-intérêts punitifs mais qui a rejeté, sur tous les autres aspects, l'appel formé par les appelants à l'encontre d'un jugement de la Cour du

[1999] A.J. No. 741 (QL). Appeal and cross-appeal dismissed.

David R. Haigh, Q.C., and Brian Beck, for the appellants/respondents on cross-appeal.

Lowell Westersund and Munaf Mohamed, for the respondent/appellant on cross-appeal.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ. was delivered by

Banc de la Reine (1999), 246 A.R. 272, 49 B.L.R. (2d) 284, [1999] A.J. No. 741 (QL). Pourvoi principal et pourvoi incident rejetés.

David R. Haigh, c.r., et Brian Beck, pour les appelants/intimés au pourvoi incident.

Lowell Westersund et Munaf Mohamed, pour l'intimée/appelante au pourvoi incident.

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Gonthier, Major, Binnie et Arbour rendu par

1 BINNIE J. — In this appeal the Court is called on to deal with rectification of a contract for a real estate development dream that turned into a nightmare for the warring partners. Houses were to have been built along the 18th fairway of the Sylvan Lake Golf Course, within commuting distance of Red Deer, Alberta. It did not happen because the parties fell out over the amount of land to be included in the development contract.

2 There was a written contract but the respondent's President did not bother to read it before it was signed. Had he done so, the error in reducing the parties' prior oral agreement to writing would likely have been detected and the development would have gone ahead. The appellants, who rely on the written document, say that a party who fails to exercise due diligence in its business affairs should be refused the equitable remedy of rectification. That is their strongest argument.

3 The principal witness and "directing mind" of the appellant Performance Industries Ltd. ("Performance"), which stands firm on the written document, is Terrance O'Connor. For him, the joint venture ended with his actions being characterized by the trial judge as "fraudulent, dishonest and deceitful" (1999), 246 A.R. 272, at para. 114. The trial judgment made him personally liable (jointly and severally with his company Performance Industries Ltd.) for \$1,047,810, including a

LE JUGE BINNIE — Dans le présent pourvoi, notre Cour est appelée à se prononcer sur la rectification d'un contrat envisageant la réalisation d'un rêve d'aménagement immobilier qui s'est transformé en cauchemar pour les associés en conflit. On projetait de construire des maisons le long du 18^e trou du terrain de golf de Sylvan Lake, en périphérie de Red Deer, en Alberta. Le projet ne s'est pas concrétisé en raison de la mésentente survenue entre les parties au sujet de la superficie du terrain visé par le contrat d'aménagement.

Il existait un contrat écrit, mais le président de l'intimée ne s'est pas donné la peine de le lire avant de le signer. S'il l'avait fait, l'erreur qui a été commise lorsqu'on a couché par écrit l'entente verbale intervenue antérieurement entre les parties aurait vraisemblablement été décelée et le projet d'aménagement aurait été réalisé. Les appelants, qui se fondent sur l'écrit, affirment qu'une partie qui a omis de faire montre de diligence raisonnable dans ses opérations commerciales doit être déboutée de sa demande en rectification fondée sur l'equity. Il s'agit de leur argument le plus solide.

Le témoin principal et l'« âme dirigeante » de l'appelante Performance Industries Ltd. (« Performance »), qui s'en tient fermement à l'écrit, est Terrance O'Connor. L'entreprise commune lui a finalement valu de voir ses actions être qualifiées par le juge de première instance de [TRADUCTION] « frauduleuses, malhonnêtes et dolosives » ((1999), 246 A.R. 272, par. 114). Ce dernier l'a condamné personnellement (solidairement avec sa société Performance Industries Ltd.) à verser la somme de

\$200,000 award of punitive damages, plus costs on a solicitor-client basis. He and his company appeal to this Court on various errors of law, few of which were argued before the trial judge.

For his erstwhile partner, Frederick Bell, whose corporate vehicle is Sylvan Lake Golf & Tennis Club Ltd. (“Sylvan”), his commercial aspirations have been trapped in the courts for seven years. This was because, so the trial judge found, O’Connor swore false affidavits, refused to produce relevant documents, gave false testimony in the course of two separate trials, and did “everything in his power to prevent the truth from coming to light” (para. 115). Bell is now said to be a spent force, “divorced [and lacking] the initiative or drive and determination to proceed with such a development at his present age” (para. 90). Bell obtained a \$200,000 punitive damage award at trial, but this was disallowed by the Alberta Court of Appeal ((2000), 255 A.R. 329, 2000 ABCA 116). In its cross-appeal, his company, Sylvan, seeks restoration of that award.

Because of the punitive damages issues, this appeal was heard concurrently with *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, judgment which is being released concurrently with this judgment.

In my view, for reasons which differ somewhat from the memorandum of judgment handed down by the Alberta Court of Appeal, the appeal and the cross-appeal should be dismissed both with costs on a party-and-party basis.

I. Facts

Sylvan had operated a 171.53 acre, 18-hole golf course since 1979 under a lease which gave it a right of first refusal in the event the owner decided to sell the land. On November 3, 1989, a purchaser unrelated to O’Connor or Performance offered to

1 047 810 \$, y compris 200 000 \$ au titre des dommages-intérêts punitifs, plus les dépens établis sur la base procureur-client. Sa société et lui se pourvoient devant notre Cour, invoquant diverses erreurs de droit, dont peu ont été débattues devant le juge de première instance.

Dans le cas de son ancien associé, Frederick Bell, propriétaire de la société Sylvan Lake Golf & Tennis Club Ltd. (« Sylvan »), le litige qui traîne devant les tribunaux depuis sept ans met un frein à ses aspirations commerciales. Tout cela, de conclure le juge de première instance, parce qu’O’Connor a souscrit des affidavits mensongers, refusé de produire des documents pertinents, donné de faux témoignages au cours de deux procès distincts et fait [TRADUCTION] « tout en son pouvoir pour empêcher la vérité d’éclater au grand jour » (par. 115). Aujourd’hui, Bell serait, dit-on, un homme usé, [TRADUCTION] « divorcé [et sans] l’initiative ou l’enthousiasme et la détermination nécessaires pour s’engager, à son âge, dans une telle entreprise » (par. 90). Bell a obtenu une somme de 200 000 \$ au titre des dommages-intérêts punitifs en première instance, mais la Cour d’appel de l’Alberta a infirmé cet aspect du jugement ((2000), 255 A.R. 329, 2000 ABCA 116). Dans son pourvoi incident devant notre Cour, sa société, Sylvan, demande le rétablissement de cette décision.

Parce qu’il est question dans les deux cas de dommages-intérêts punitifs, le présent pourvoi a été entendu avec l’affaire *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18, qui est décidée en même temps.

Je suis d’avis, pour des motifs quelque peu différents de ceux exposés par la Cour d’appel de l’Alberta, de rejeter le pourvoi principal et le pourvoi incident, avec dépens sur la base partie-partie dans les deux cas.

I. Les faits

Sylvan exploitait depuis 1979 un terrain de golf d’une superficie de 171,53 acres et comptant 18 trous, en vertu d’un bail qui lui conférait un droit de premier refus si le propriétaire du golf décidait de le vendre. Le 3 novembre 1989, un acheteur sans

4

2002 SCC 19 (CanLII)

5

6

7

purchase the golf course property for \$1.3 million. Sylvan then had until December 31, 1989 to make the purchase on the same terms and conditions. The outside offer triggered the chain of events that led to this action.

8 O'Connor was familiar with the Sylvan Lake Golf Course, having played it frequently and having hosted his corporate tournament at that site for some years.

9 O'Connor, unbeknownst to Bell, had approached the landowner with a view to purchasing the leased golf course property, without result. He had obtained a financing commitment as early as March 31, 1989, from the Federal Business Development Bank ("FBDB"). On learning that Sylvan had exercised its right of first refusal, O'Connor approached Bell with an offer of financial assistance, which was declined. However, when Bell's former partner dropped out, and Sylvan's efforts to finance the purchase of the golf course through other means proved unsuccessful, Bell went back to O'Connor. Bell testified that at that meeting he discussed with O'Connor how Bell wanted to secure another five years of operation of the golf course with a chance at the end of that time to secure his retirement by the development of the 18th hole for residential development. Negotiations for a joint venture ensued near the end of November or early December 1989.

10 After a number of preliminary meetings, O'Connor spent about two and a half hours at Bell's home during the December 16-17 weekend. The two men met at length in O'Connor's truck a day or two later. The trial judge found that Bell and O'Connor came to a verbal agreement on the terms of their joint venture. They would pool their resources plus a \$700,000 mortgage from the FBDB to purchase the property. Sylvan (Bell) would thereafter operate the facilities for five years for its own account without any day-to-day involvement of O'Connor. In brief, at the conclusion of five years, Sylvan would be bought out by Performance

aucun lien avec O'Connor ou Performance a offert d'acheter le terrain de golf pour la somme de 1,3 million de dollars. Sylvan avait jusqu'au 31 décembre 1989 pour faire l'acquisition du golf aux mêmes conditions. L'offre extérieure a déclenché la succession d'événements qui ont conduit à la présente action.

O'Connor connaissait le terrain de golf de Sylvan Lake, puisqu'il y avait joué fréquemment et y avait organisé le tournoi de golf de son entreprise pendant quelques années.

À l'insu de Bell, O'Connor avait discuté avec le propriétaire du terrain de golf loué par Sylvan de la possibilité d'acquérir le terrain, mais sans succès. Dès le 31 mars 1989, il avait obtenu un engagement de financement de la Banque fédérale de développement (« BFD »). Lorsqu'il a appris que Sylvan avait exercé son droit de premier refus (ou droit de préemption), O'Connor a fait une offre d'aide financière à Bell, qui l'a refusée. Toutefois, lorsque l'ancien associé de Bell s'est désisté et que les efforts de Sylvan en vue de financer par d'autres moyens l'achat du golf se sont révélés infructueux, Bell a repris contact avec O'Connor. Bell a témoigné que, au cours de leur rencontre, il avait dit à O'Connor qu'il souhaitait s'assurer la faculté d'exploiter le golf pendant une autre période de cinq ans, ainsi que la possibilité, au terme de cette période, de réaliser un complexe domiciliaire près du 18^e trou, dans le but de s'assurer une retraite confortable. Des négociations en vue d'établir une coentreprise se sont amorcées vers la fin novembre ou le début décembre 1989.

Après un certain nombre d'entretiens préliminaires, O'Connor a passé environ deux heures et demie à la résidence de Bell au cours de la fin de semaine des 16 et 17 décembre. Les deux hommes ont discuté abondamment dans le camion d'O'Connor un ou deux jours plus tard. Le juge de première instance a estimé que Bell et O'Connor s'étaient entendus verbalement sur les modalités de leur coentreprise. Ils mettraient en commun leurs ressources ainsi qu'un prêt hypothécaire de 700 000 \$ consenti par la BFD pour acheter le terrain de golf. Sylvan (Bell) l'exploiterait ensuite pour son propre compte pendant cinq ans, sans la participation journalière

(O'Connor) for an agreed sum less any money then outstanding on the FBDB mortgage.

For present purposes, the only contentious issue was the option for a residential development to be undertaken by Bell (or a third party) “along the 18th fairway”. O'Connor and Bell did not discuss a metes and bounds description of the optioned land, but Bell testified, and the trial judge accepted, that he showed O'Connor photographs and plans of the sort of development he had in mind, namely a *double row* of houses (i.e., on both sides of a street) clustered around a *cul-de-sac* along the length of the 18th fairway (480 yards). A photograph of a comparable golf course development where Bell had lived in the Bayview area of Toronto formed part of the negotiations (and was marked at trial as Exhibit 1, Tab 67). O'Connor agreed to option the land to permit such a development, otherwise (as the trial judge found) Bell would not have agreed to the five-year joint venture. The parties agreed that the purchase price of the optioned land would be \$400,000 by a third party (or \$200,000 if the existing owner Sylvan (Bell) chose to develop the parcel).

As part of the agreement, O'Connor undertook to have his lawyer reduce the verbal terms to writing. In due course, a document was produced. Clause 18, the option, accurately specified the 480-yard length of the proposed development, but instead of sufficient width to permit a double row of houses (approximately 110 yards), clause 18 allowed only enough land for a single row of houses (110 feet). This misstatement of the oral agreement was thus pleaded in para. 9 of the Statement of Claim:

Paragraph 18 of the December 21st, 1989 written Agreement did not accurately reflect the terms of the oral agreement made between Performance and Sylvan in that it misdescribed the width of the lands subject

d'O'Connor. Au terme de la période de cinq ans, Sylvan serait achetée par Performance (O'Connor) pour une somme déterminée, déduction faite de tout solde de l'emprunt hypothécaire obtenu de la BFD.

Dans le présent pourvoi, le seul point litigieux est l'option relative à la construction du complexe domiciliaire susceptible d'être exécutée par Bell (ou par un tiers) au [TRADUCTION] « 18^e trou ». O'Connor et Bell n'ont pas discuté de la description technique du terrain visé par l'option, mais dans son témoignage Bell a affirmé — et le juge de première instance l'a cru — avoir montré à O'Connor des photographies et des plans du type de complexe qu'il envisageait, à savoir une *double* rangée de maisons (c.-à-d. de chaque côté d'une rue) regroupées autour d'un cul-de-sac le long du 18^e trou (qui mesure 480 verges). Une photographie montrant un complexe comparable — qui est situé près d'un terrain de golf et où Bell a habité dans la région torontoise de Bayview — a été produite dans le cours des négociations (et déposée en preuve sous la cote P1, onglet 67). O'Connor a accepté de consentir une option visant l'achat de terrains en vue de permettre la construction d'un tel complexe, option sans laquelle (a conclu le juge de première instance) Bell n'aurait pas accepté la coentreprise de cinq ans. Les parties ont convenu que le prix d'achat des terrains visés par l'option serait de 400 000 \$ en cas d'acquisition par un tiers (ou de 200 000 \$ si Sylvan (Bell), qui en était alors propriétaire, décidait de les aménager).

Comme convenu, O'Connor a confié à son avocat la tâche de coucher par écrit les termes de l'entente verbale. Un document a été produit en temps voulu. La clause 18, établissant l'option, mentionnait de façon précise la longueur de 480 verges du complexe proposé, mais au lieu de prévoir une largeur suffisante pour permettre la construction d'une double rangée de maisons (environ 110 verges), elle ne faisait état que d'une largeur suffisante pour une seule rangée de maisons (110 pieds). Cette constatation inexacte de l'entente verbale a été invoquée ainsi, au par. 9 de la déclaration :

[TRADUCTION] Le paragraphe 18 de la Convention écrite du 21 décembre 1989 ne reflète pas fidèlement les termes de l'entente verbale intervenue entre Performance et Sylvan, en ce qu'il décrit faussement la largeur des

11

2002 SCC 19 (CanLII)

12

to the Agreement as “One Hundred and Ten (110 ft.) feet in width east to west”, when the width of the lands comprising the 18th hole was approximately 110 *yards* in width east to west. [Emphasis in original.]

Bell had in mind a development of about 58 homes on about 11 acres. O’Connor’s draft allowed 3.6 acres. Bell testified, and the trial judge accepted, that he had specifically told O’Connor during the negotiations that a single row housing development (which is all that clause 18 would permit) would “be a waste of land and an uneconomic use of the 18th hole” (para. 42).

13 Clause 18 of the Joint Venture Agreement, as drawn up by O’Connor’s lawyer, provided as follows:

18. The parties agree that sale of a portion of the lands for development of residential housing is contemplated by both of them within the term of Sylvan’s tenancy. Such portion of the lands is: one hundred ten (110 ft) feet in width east to west and approximately four hundred eighty (480 yds) yards in length north to south, and abutted by the eastern border of the lands along its entire length. The parties agree that, if they are presented with an appropriate offer, those lands will be sold to a third party developer. It is agreed that such appropriate offer will offer the sum of at least four hundred thousand (\$400,000) dollars cash for those lands and provide for the continued, uninterrupted existence of the golf course consisting of no less than six thousand two hundred fifty (6250 yds) yards in length with all eighteen fairways well divided, defined and reasonably wide (for reference sake the parties agree that the fairways of the golf course are, at the date of this agreement, for the most part well divided, defined and reasonably wide). [Emphasis added.]

14 On December 21, 1989, O’Connor and Bell signed the Joint Venture Agreement as well as the documentation to finance the purchase of all of the land. The documents were then delivered to the solicitor for Sylvan, who reviewed it, and suggested revisions, which led to the signing of an amended Joint Venture Agreement on December 27, 1989. Sylvan’s solicitor testified at trial that he did not

terrains visés par la convention comme étant « cent dix pieds (110 pi.) de largeur dans une orientation est-ouest », alors que la largeur des terrains du 18^e trou était d’environ 110 *verges* dans une orientation est-ouest. [En italique dans l’original.]

Bell envisageait la construction d’environ 58 maisons, sur à peu près 11 acres. Le projet de convention établi par O’Connor ne prévoyait que 3,6 acres. Le juge de première instance a ajouté foi à l’affirmation de Bell selon laquelle il avait expressément dit à O’Connor, au cours des négociations, que la construction d’une seule rangée de maisons (qui était tout ce que la clause 18 permettait) serait [TRADUCTION] « un gaspillage de terrain et une utilisation non rentable du 18^e trou » (par. 42).

Voici le texte de la clause 18 de la Convention de coentreprise, telle qu’elle avait été rédigée par l’avocat d’O’Connor :

[TRADUCTION]

18. Les deux parties reconnaissent qu’elles envisagent la vente d’une partie des terrains aux fins de construction d’un complexe domiciliaire pendant la durée de la tenance à bail de Sylvan. Cette parcelle est décrite ainsi : cent dix (110) pieds de largeur dans une orientation est-ouest et environ quatre cent quatre-vingt (480) verges de longueur dans une orientation nord-sud, et contiguë à la limite est du terrain sur toute sa longueur. Les parties conviennent que, si elles reçoivent une offre convenable, ces terrains seront vendus à un tiers promoteur. Il est convenu que constituerait une offre convenable le paiement d’une somme d’au moins quatre cent mille dollars (400 000 \$) en espèces pour ces terrains, en plus de l’engagement d’assurer sans interruption l’existence du terrain de golf, qui doit avoir une superficie minimale de six mille deux cent cinquante (6250) verges de longueur et compter dix-huit trous bien divisés, bien définis et raisonnablement larges (à titre d’information, les parties reconnaissent que, à la date de la présente convention, les trous du terrain de golf sont pour la plupart bien divisés, bien définis et raisonnablement larges). [Je souligne.]

Le 21 décembre 1989, O’Connor et Bell ont signé la Convention de coentreprise de même que la documentation relative au financement de l’achat de l’ensemble de la propriété. Les documents ont alors été communiqués à l’avocat de Sylvan, qui les a examinés et a suggéré quelques modifications, ce qui a eu pour effet de retarder au 27 décembre 1989 la signature de la Convention de coentreprise

discuss the optioned property dimensions with Bell, and Bell said he never read the option clause. All copies of the documents had been left with his lawyer. O'Connor's solicitor was not called to testify, an omission that caused the trial judge to draw the adverse inference that if the lawyer had testified, it would not have assisted O'Connor.

O'Connor knew from Bell's comment during the negotiations that he would not sign an agreement without the option for sufficient land to create the "Bayview" layout development with two rows of housing. Anything less would be "a waste". O'Connor therefore knew when Bell signed the document that he had not detected the substitution of 110 *feet* for 110 *yards*.

In 1990, Bell experienced some "cash flow difficulties" that led to a modification to the financial terms of the Agreement, but pressed ahead with plans for the potential development. For a time in 1992, he worked with UMA Engineering Ltd. He subsequently retained Norman Truth, a development consultant, who produced alternative plans and sketches for developments of 50 and 58 houses along the 18th fairway. Truth estimated the 58-house project on or about 10.9 acres would net \$820,100. In some respects, Bell was looking for more land than O'Connor had verbally agreed to. The proposals would, as contemplated from the outset, involve a measure of realignment of the 18th fairway. Bell therefore left these development proposals with O'Connor, who said he would review them. In the meantime, the lands in the golf course had been annexed to the Town of Sylvan Lake and there was potential for development of the entire 171.5 acres, much to O'Connor's benefit.

modifiée. Au procès, l'avocat de Sylvan a témoigné ne pas avoir discuté avec Bell des dimensions de la parcelle visée par l'option, et Bell a déclaré ne jamais avoir lu la clause relative à l'option. Tous les exemplaires des documents avaient été remis à son avocat. L'avocat d'O'Connor n'a pas été appelé à témoigner, omission qui a amené le juge du procès à tirer la conclusion défavorable à O'Connor selon laquelle la déposition de l'avocat n'aurait pas aidé la cause d'O'Connor.

O'Connor savait, à la lumière des commentaires formulés par Bell durant les négociations, que ce dernier ne signerait aucune Convention ne lui accordant pas la faculté d'acquérir suffisamment de terrain pour aménager un complexe de type « Bayview » comportant deux rangées de maisons. Toute superficie inférieure serait [TRADUCTION] « un gaspillage de terrain ». O'Connor savait par conséquent que, lorsque Bell avait signé le document, il n'avait pas remarqué qu'on avait substitué la mesure 110 *pieds* à la mesure 100 *verges*.

En 1990, Bell a connu quelques [TRADUCTION] « problèmes de trésorerie » qui ont entraîné une modification des modalités financières de la Convention, mais il n'en a pas moins poursuivi l'élaboration des plans de l'éventuel complexe. Pendant un certain temps en 1992, il y a travaillé avec la société UMA Engineering Ltd. Il a subsequmment retenu les services de Norman Truth, consultant en aménagement, qui a préparé d'autres plans et croquis proposant la construction de 50 et 58 maisons le long du 18^e trou. M. Truth estimait que le projet de construction de 58 maisons sur une parcelle d'environ 10,9 acres pourrait rapporter 820 100 \$. À certains égards, Bell envisageait une superficie plus vaste que celle dont avait convenu verbalement O'Connor. Conformément à ce qui avait été envisagé dès le départ, ces propositions impliquaient un certain réaménagement du tracé du 18^e trou. Bell a donc remis ces propositions d'aménagement à O'Connor, qui a dit qu'il les examinerait. Entre-temps, les terrains du parcours de golf avaient été annexés à la ville de Sylvan Lake et il était devenu possible d'aménager l'ensemble des 171,5 acres, situation très avantageuse pour O'Connor.

15

16

17 Time went by. In May 1993, Bell again contacted O'Connor, who promised to review the proposal, but did not respond either then or even after a later meeting arranged by Bell's wife. The clock was running because the option required the development to be completed by December 31, 1994. Finally, by letter dated June 8, 1993, O'Connor's lawyer advised Bell that "[i]t is very unlikely that Performance Industries Ltd. will approve of any development plan which is not strictly in line with the Agreement".

18 Bell testified that at that point, for the first time, he read clause 18 and realized that it did not conform to the oral agreement. O'Connor, he concluded, had slipped in a change of dimensions that turned a viable project into "a waste of land". Bell says he was incensed. He attended at O'Connor's office for what he described as a heated meeting.

19 Attempts were made to resolve the dispute, but O'Connor continued to insist that Bell's right to develop the property was limited under clause 18 of the Agreement to a strip of land 110 feet wide on the easterly boundary of the golf course adjacent to the 18th hole. Bell continued to insist that O'Connor live up to the verbal agreement, which would require 110 feet being read as 110 yards.

20 In December 1994, the 5-year duration of the joint venture coming up for expiry, O'Connor tendered the funds required to buy out Sylvan's interest. Bell refused to allow Sylvan to relinquish possession of the land, and O'Connor commenced an action for specific performance. The Alberta Court of Queen's Bench granted an order for specific performance and O'Connor assumed possession of the property and built a clubhouse at the 18th hole. Also in late 1994, Sylvan commenced the present action against Performance and O'Connor for rectification of the Agreement or damages in lieu thereof, punitive damages and solicitor-client costs.

Puis le temps a passé. En mai 1993, Bell a de nouveau communiqué avec O'Connor, qui a promis d'examiner la proposition mais n'y a pas répondu, ni à ce moment ni après une rencontre subséquente organisée par l'épouse de Bell. Le temps continuait cependant de courir, car l'option exigeait que l'aménagement soit complété au plus tard le 31 décembre 1994. Finalement, dans une lettre datée du 8 juin 1993, l'avocat d'O'Connor a avisé Bell qu'[TRADUCTION] « [i]l [était] très peu probable que Performance Industries Ltd. approuve tout projet d'aménagement qui ne soit pas strictement conforme à la Convention ».

Bell a témoigné qu'à ce moment, pour la première fois, il a lu la clause 18 et constaté qu'elle ne correspondait pas à l'entente verbale. O'Connor, a-t-il conclu, avait introduit un changement de dimension qui avait transformé un projet viable en [TRADUCTION] « un gaspillage de terrain ». Il était furieux, a-t-il dit. Il s'est rendu au bureau d'O'Connor, où ils ont eu une discussion qu'il a qualifiée de très animée.

Des efforts ont été déployés afin de résoudre le différend, mais O'Connor continuait à maintenir que, aux termes de la clause 18 de la Convention, Bell n'avait le droit d'aménager la propriété que sur une bande de terrain de 110 pieds de largeur, contiguë au 18^e trou, du côté est du terrain de golf. Bell, pour sa part, continuait d'exiger qu'O'Connor respecte l'entente verbale, ce qui impliquait qu'on considère que la mention 110 pieds signifiait plutôt 110 verges.

En décembre 1994, avant l'expiration de la période de validité de cinq ans de la coentreprise, O'Connor a offert les sommes nécessaires pour racheter la participation de Sylvan. Bell a refusé de permettre à Sylvan de se départir de la possession du terrain et O'Connor a engagé une action demandant l'exécution forcée de la Convention. La Cour du Banc de la Reine de l'Alberta a fait droit à l'action et O'Connor a pris possession de la propriété et construit un pavillon au 18^e trou. Également à la fin de 1994, Sylvan a entamé contre Performance et O'Connor la présente action sollicitant soit la rectification de la Convention soit des dommages-intérêts en tenant lieu, des dommages-intérêts punitifs et les dépens sur la base procureur-client.

II. Judicial History

A. *Alberta Court of Queen's Bench* (1999), 246 A.R. 272

Wilkins J. noted that the onus was on the plaintiff “to establish both that Bell was mistaken as to the description of the development property when he signed the Agreement and that O’Connor knew of his mistake” (para. 66).

In the view of Wilkins J., “O’Connor’s conduct in attempting to take advantage of the mistake he knew Bell to have made in signing the Agreement is equivalent to a fraud or a misrepresentation amounting [to] fraud or sharp practice” (para. 87). He concluded that “[i]t would be unjust, inequitable and unconscionable for this court not to offer redress to Bell in the face of that conduct” (para. 87). Accordingly, it was “clear from the evidence” that Bell is entitled to rectification of clause 18 of the Agreement. Sylvan was awarded damages in lieu of specific performance of the rectified Joint Venture Agreement.

The compensatory damages were assessed on the basis of “the amount of money that Bell would have been entitled to [receive] had he been permitted to complete the residential development of the 18th hole in accordance with the terms of the rectified clause 18” (para. 92). Wilkins J. was satisfied that a development of 58 houses could have “been constructed and substantially marketed prior to December 31, 1994” (para. 93). In the result, he assessed damages on the basis of the 58-lot development on the 480-yard 18th fairway in the amount of \$820,100. From this he subtracted \$200,000 (being the amount Sylvan (Bell) would have had to pay Performance (O’Connor) to exercise the \$400,000 option) for a net of \$620,100.

With respect to punitive damages, Wilkins J. reiterated that he found “the actions of O’Connor to be tantamount to fraud, equivalent to a misrepresentation in the nature of fraud, and sharp practice” (para. 109). O’Connor’s “actions demand an award which will stand as an example to others

II. L’historique des procédures judiciaires

A. *Cour du Banc de la Reine de l’Alberta* (1999), 246 A.R. 272

Le juge Wilkins a souligné qu’il incombait au demandeur [TRADUCTION] « d’établir à la fois que Bell se trompait quant à la description du bien-fonds à aménager lorsqu’il a signé la Convention et qu’O’Connor savait qu’il se trompait » (par. 66).

Selon le juge Wilkins, [TRADUCTION] « [l]a façon dont O’Connor s’est comporté en tentant de tirer avantage de l’erreur qu’il savait que Bell avait commise en signant la Convention équivaut à une fraude ou à une assertion inexacte assimilable à fraude ou à dol » (par. 87). Il a conclu qu’[TRADUCTION] « [i]l serait injuste, inéquitable et abusif que la cour n’accorde pas réparation à Bell devant une telle conduite » (par. 87). En conséquence, il ressortait [TRADUCTION] « clairement de la preuve » que Bell avait droit à la rectification de la clause 18 de la Convention. Sylvan a obtenu des dommages-intérêts au lieu de l’exécution forcée de la Convention de coentreprise rectifiée.

Les dommages-intérêts compensatoires ont été fixés à [TRADUCTION] « la somme que Bell aurait eu le droit de [recevoir] si on lui avait permis de construire le complexe domiciliaire au 18^e trou conformément aux termes de la clause 18 rectifiée » (par. 92). Le juge Wilkins était convaincu qu’un complexe de 58 maisons aurait pu [TRADUCTION] « être construit et en grande partie vendu avant le 31 décembre 1994 » (par. 93). En conséquence, il a fixé 820 100 \$ les dommages-intérêts compensatoires, sur la base de l’aménagement d’un complexe de 58 lots au 18^e trou, qui mesure 480 verges. De cette somme, il a soustrait 200 000 \$ (soit la somme que Sylvan (Bell) aurait eu à verser à Performance (O’Connor) pour lever l’option de 400 000 \$), ce qui a donné un résultat net de 620 100 \$.

Relativement aux dommages-intérêts punitifs, le juge Wilkins a réitéré sa conclusion que les [TRADUCTION] « actions d’O’Connor étaient assimilables à une fraude ou à une assertion inexacte participant de la fraude et du dol » (par. 109). Les « actions [d’O’Connor] commandent [sa] condamnation

21

22

23

24

and at the same time assure that [he] does not unduly profit from his conduct” (para. 109). Wilkins J. stated that “[this] latter statement is the only proper basis for an award of punitive damages” (para. 109) in this case. Accordingly, O’Connor’s punitive damages should be awarded “at least to the extent of disgorging the base profit he has realized by his improper conduct” (para. 110). Punitive damages were assessed at \$200,000. For their misbehaviour in the conduct of the action, the defendants (now appellants) were required to pay solicitor-client costs.

à une somme qui aura valeur d’exemple et en même temps fera en sorte qu’[il] ne profite pas indûment de sa conduite » (par. 109). Le juge Wilkins a dit que [TRADUCTION] « [l]a seconde partie de l’affirmation qui précède est le seul fondement justifiant d’accorder des dommages-intérêts punitifs » (par. 109) en l’espèce. Par conséquent, O’Connor devrait être condamné, au titre des dommages-intérêts punitifs, au paiement d’une somme [TRADUCTION] « à tout le moins suffisante pour lui faire remettre le profit indigne qu’il a réalisé par sa conduite répréhensible » (par. 110). Les dommages-intérêts punitifs ont été établis à 200 000 \$. En raison de leur comportement abusif pendant le déroulement de l’action, les défendeurs (appelants au présent pourvoi) ont été condamnés aux dépens sur la base procureur-client.

25 O’Connor argued that he should not be personally liable for any judgment against Performance in favour of the plaintiff, but Wilkins J. rejected this argument “in its entirety” (para. 119). He said that every step taken in furtherance of this joint venture was directed by O’Connor, as was every attempt to defeat Bell’s legitimate interests in the protracted litigation. “Surely there could never be a clearer case in which the court must pierce the corporate veil and attribute” (para. 119) liability personally to O’Connor. And so he did.

O’Connor a prétendu qu’il ne devait pas être tenu personnellement responsable à l’égard de tout jugement prononcé contre Performance en faveur de la demanderesse, mais le juge Wilkins a « complètement » (par. 119) rejeté cet argument. Le juge a dit que chaque mesure prise pour appuyer cette coentreprise l’avait été à l’instigation d’O’Connor, comme toutes les tentatives visant à miner les intérêts légitimes de Bell dans cet interminable litige. [TRADUCTION] « Il ne saurait certes y avoir de cas plus clair où la cour doit écarter le bénéfice de la personnalité juridique et tenir » (par. 119) O’Connor personnellement responsable. Et c’est ce qu’a fait le juge Wilkins.

B. *Alberta Court of Appeal* (2000), 255 A.R. 329, 2000 ABCA 116

B. *Cour d’appel de l’Alberta* (2000), 255 A.R. 329, 2000 ABCA 116

26 In a *per curiam* decision, the Court of Appeal upheld Wilkins J.’s rulings that the Agreement could be rectified and that the corporate veil could be lifted. It also upheld the damages award, with the exception of the award for punitive damages, which it set aside. The order for solicitor-client costs was similarly upheld.

Dans un arrêt *per curiam*, la Cour d’appel a confirmé la décision du juge Wilkins indiquant que la Convention pouvait être rectifiée et que le bénéfice de la personnalité juridique pouvait être écarté. Elle a aussi confirmé les décisions de ce dernier relativement aux dommages-intérêts, sauf celle concernant les dommages-intérêts punitifs, qu’elle a annulée. Elle a également confirmé l’ordonnance accordant les dépens sur la base procureur-client.

27 With respect to compensatory damages, the Court of Appeal was “not prepared to interfere with the award of damages in this case” (para. 27). It

En ce qui a trait aux dommages-intérêts compensatoires, la Cour d’appel a dit [TRADUCTION] « ne pas être disposée à modifier les

did, however, describe the trial judge's award as "generous" (para. 27).

The Court of Appeal agreed with the trial judge that "the misconduct of the defendants was so outrageous that punishment and deterrence [were] required" (para. 28), but that punitive damages "should be awarded only if they achieve some rational purpose" (para. 28). In the Court of Appeal's view, the "substantial and generous compensatory damages awarded" (para. 29) by the trial judge satisfy both the punishment and deterrence objectives in this case. The Court of Appeal was also of the view that this was not a case where it was necessary to award punitive damages to ensure that the defendant does not profit from his misconduct. O'Connor would have profited under the Agreement even if he had not misbehaved. Accordingly, the Court of Appeal set aside the punitive damages award. In all other respects, the appeal was dismissed.

III. Analysis

When reasonably sophisticated businesspeople reduce their oral agreements to written form, which are prepared and reviewed by lawyers, and changes made, and the documents are then executed, there is usually little scope for rectification. Nor does a falling out between business partners usually attract an award of punitive damages. This case is unusual because of the findings of fraud and deceit made against the appellant O'Connor by the trial judge. The appellants are therefore obliged to try to make their case, if at all, out of the mouth of Bell, with such help as they can find in the law books for their position.

Counsel for the appellants (who was not counsel at trial) seeks to raise three issues, which he describes as follows: (1) the relationship between the plea of

dommages-intérêts en l'espèce» (par. 27). Elle a toutefois qualifié de « généreux » (par. 27) le quantum accordé par le juge de première instance.

La Cour d'appel a souscrit à la conclusion du juge de première instance que [TRADUCTION] « la conduite répréhensible des défendeurs était à ce point inacceptable que des mesures de punition et de dissuasion s'imposaient » (par. 28), mais elle a ajouté que des dommages-intérêts punitifs « ne doivent être accordés que s'ils servent un objectif rationnel » (par. 28). De l'avis de la Cour d'appel, les [TRADUCTION] « dommages-intérêts compensatoires substantiels et généreux accordés » (par. 29) par le juge de première instance satisfaisaient à la fois aux objectifs de punition et de dissuasion en l'espèce. La Cour d'appel estimait également ne pas être en présence d'une affaire où des dommages-intérêts punitifs étaient requis pour faire en sorte que le défendeur ne profite pas de sa conduite répréhensible. O'Connor aurait tiré des bénéfices de l'exécution de la Convention, même s'il ne s'était pas comporté de façon répréhensible. La Cour d'appel a donc annulé la décision accordant les dommages-intérêts punitifs. L'appel a toutefois été rejeté sur tous les autres points.

III. L'analyse

Lorsque des gens d'affaires raisonnablement avertis couchent par écrit leurs ententes verbales, dans des documents qui sont préparés et revus par des avocats puis modifiés avant d'être signés, il y a généralement peu de chances qu'il y ait lieu à rectification. Pas plus d'ailleurs qu'une mésentente entre associés commerciaux n'entraîne ordinairement une condamnation à des dommages-intérêts punitifs. La présente affaire est inhabituelle en ce que le juge de première instance a conclu à l'existence de fraude et de dol de la part de l'appelant O'Connor. Les appellants doivent par conséquent tenter d'établir le bien-fondé de leurs prétentions, pour peu que cela soit possible, à partir des assertions mêmes de Bell et en s'appuyant sur tout ce qu'ils peuvent trouver dans la jurisprudence au soutien de leur thèse.

L'avocat des appelants (qui ne les représentait pas en première instance) soulève trois points, qu'il énonce ainsi : (1) le rapport entre l'allégation

28

29

30

unilateral mistake and the remedy of rectification (particularly where the mistake is the product of the plaintiff's own negligence); (2) the kind of pleading and proof that a plaintiff who seeks rectification must offer, as well as the proper standard of proof to apply in rectification cases; and, (3) the proper method of quantifying damages ordered in lieu of rectification in cases where the subject matter of the rectified contract is an option for the sale of land. The respondent, as stated, cross-appeals against the quashing of the award of punitive damages.

A. Rectification of the Contract

31

Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud". The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud". The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other: *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at p. 630; *Ship M. F. Whalen v. Pointe Anne Quarries Ltd.* (1921), 63 S.C.R. 109, at pp. 126-27; *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550 (Ont. C.A.), at p. 558; G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 867; S. M. Waddams, *The Law of Contracts* (4th

d'erreur unilatérale et la réparation que constitue la rectification (particulièrement lorsque l'erreur est le fruit de la propre négligence du demandeur); (2) le type d'allégations et de preuve que doit présenter le demandeur qui sollicite la rectification, de même que la norme de preuve applicable en pareil cas; (3) la méthode appropriée pour quantifier les dommages-intérêts accordés à la place de la rectification lorsque l'objet du contrat rectifié est une option portant sur la vente de terrains. Comme il a été mentionné plus tôt, l'intimée se pourvoit de façon incidente contre l'annulation de la décision accordant les dommages-intérêts punitifs.

A. Rectification du contrat

La rectification est une réparation en equity visant à empêcher qu'un écrit soit utilisé comme moyen de commettre une fraude ou de se livrer à une conduite répréhensible [TRADUCTION] « équivalant à fraude ». La règle traditionnelle ne permettait la rectification qu'en cas d'erreur mutuelle, mais il y a maintenant ouverture à rectification en cas d'erreur unilatérale (comme dans la présente affaire), pourvu que certains préalables rigoureux soient réunis. Dans la mesure où ils sont pertinents en l'espèce, ces préalables peuvent être résumés ainsi. La rectification est fondée sur l'existence d'un contrat verbal préalable dont les conditions sont déterminées et déterminables. Le demandeur doit établir que les conditions convenues verbalement n'ont pas été couchées adéquatement par écrit. L'erreur peut être frauduleuse ou innocente. L'exigence essentielle est que, au moment de la signature de l'écrit, le défendeur connaissait l'erreur ou aurait dû la connaître, et que le demandeur n'en connaissait pas l'existence. De plus, la tentative du défendeur d'utiliser l'écrit erroné doit constituer « une fraude ou l'équivalent d'une fraude ». La tâche des tribunaux dans une affaire de rectification est de corriger et non de faire des supputations. Elle consiste à reconstituer le marché original conclu par les parties, et non à rectifier une erreur de jugement qu'une partie aurait reconnue tardivement : *Hart c. Boutilier* (1916), 56 D.L.R. 620 (C.S.C.), p. 630; *Ship M. F. Whalen c. Pointe Anne Quarries Ltd.* (1921), 63 R.C.S. 109, p. 126-127; *Downtown King West Development Corp. c. Massey*

ed. 1999), at para. 336. In *Hart*, *supra*, at p. 630, Duff J. (as he then was) stressed that “[t]he power of rectification must be used with great caution”. Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.

B. Preliminary Objection

The respondent says the appellants ought not to be allowed to argue various objections to rectification that were not raised at trial. The alleged uncertainty about the terms of the prior oral agreement, for example, is an issue that did not come into bloom until after the appellants had lost in the Alberta Court of Appeal. There is some merit in this objection. Unless the parties have fully addressed a factual issue at trial in the evidence, and preferably in argument for the benefit of the trial judge, there is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge’s view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited. As Duff J. put it in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at p. 539:

A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

In my view, the appellants’ contentions on the rectification issues are fact-based, but are manageable on the evidentiary record and raise important issues of law and equity. The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the

Ferguson Industries Ltd. (1996), 133 D.L.R. (4th) 550 (C.A. Ont.), p. 558; G. H. L. Fridman, *The Law of Contract in Canada* (4^e éd. 1999), p. 867; S. M. Waddams, *The Law of Contracts* (4^e éd. 1999), par. 336. Dans l’arrêt *Hart*, précité, p. 630, le juge Duff (plus tard Juge en chef du Canada) a souligné que [TRADUCTION] « [l]e pouvoir de rectification ne doit être utilisé qu’avec grande prudence ». Tout assouplissement de l’application de la rectification qui en ferait un substitut à l’exercice de diligence raisonnable lors de la signature d’un document aurait pour effet d’ébranler la confiance du monde des affaires à l’égard des contrats écrits.

B. Objection préliminaire

L’intimée prétend que les appelants ne devraient pas être admis à plaider des objections à la rectification qui n’ont pas été soulevées au procès. Par exemple, l’incertitude qui caractériserait les conditions de l’entente verbale antérieure est une question que n’ont soulevée les appelants qu’après avoir été déboutés par la Cour d’appel de l’Alberta. Cette objection n’est pas sans fondement. À moins que les parties n’aient traité de façon exhaustive une question de fait au procès en présentant leur preuve, et de préférence au cours des plaidoiries devant le juge, il y a toujours un risque très réel que le dossier d’appel ne comporte pas tous les faits pertinents ou l’opinion du juge de première instance sur quelque question de fait cruciale, ou encore que n’ait jamais été obtenue une explication qui aurait pu être donnée par une partie ou par un ou plusieurs de ses témoins en déposant. Comme l’a dit le juge Duff dans l’arrêt *Lamb c. Kincaid* (1907), 38 R.C.S. 516, p. 539 :

[TRADUCTION] Selon moi, un tribunal d’appel ne devrait pas recevoir un tel argument soulevé pour la première fois en appel, à moins qu’il ne soit clair que, même si la question avait été soulevée en temps opportun, elle n’aurait pas été éclaircie davantage.

À mon avis, les prétentions des appelants au sujet des questions touchant à la rectification reposent sur des faits, mais elles peuvent être examinées à la lumière de la preuve au dossier et elles soulèvent d’importantes questions de droit et d’équité. Il est loisible à la Cour, dans le cadre d’un pourvoi,

opposing party and where the refusal to do so would risk an injustice.

d'examiner une nouvelle question de droit dans les cas où elle peut le faire sans qu'il en résulte de préjudice d'ordre procédural pour la partie adverse et où son refus de le faire risquerait d'entraîner une injustice.

34 Here the respondent sought and obtained an equitable remedy to rectify a situation which need never have arisen had Bell properly read the draft document in December 1989. He who seeks equity must do equity. If equitable relief had been wrongfully granted, we should not close our eyes to a fatal objection because of counsel's oversight at trial. The facts vital to the appellants' new legal position are readily ascertainable in the evidence and the necessary findings are implicit, if not always explicit, in the trial judge's reasons.

En l'espèce, l'intimée a demandé et obtenu une réparation en equity pour faire rectifier une situation qui n'aurait jamais dû se produire si Bell avait lu adéquatement le projet de convention en décembre 1989. Qui sollicite l'équité doit lui-même agir avec équité. Si la réparation en equity a été accordée à tort, nous ne devrions pas faire abstraction d'une objection fatale parce que l'avocat a omis de la soulever au procès. Les faits essentiels à la nouvelle thèse juridique avancée par les appelants sont faciles à dégager de la preuve et les conclusions nécessaires sont implicites, sinon toujours explicites, dans les motifs du juge de première instance.

C. *The Conditions Precedent to Rectification*

C. *Les préalables à la rectification*

35 As stated, high hurdles are placed in the way of a businessperson who relies on his or her own unilateral mistake to resile from the written terms of a document which he or she has signed and which, on its face, seems perfectly clear. The law is determined not to open the proverbial floodgates to dissatisfied contract makers who want to extricate themselves from a poor bargain.

Comme il a été indiqué précédemment, la personne en affaires qui invoque sa propre erreur unilatérale pour se soustraire aux conditions — couchées par écrit — d'un document qu'elle a signé et qui, à première vue, semble parfaitement clair, doit surmonter de sérieux obstacles. Le droit est résolu à prévenir la proverbiale avalanche de poursuites que pourraient vouloir engager des contractants insatisfaits, qui veulent se délier d'un marché peu avantageux.

36 I referred earlier to the four conditions precedent, or "hurdles" that a plaintiff must overcome. To these the appellants wish to add a fifth. Rectification, they say, should not be available to a plaintiff who is negligent in reviewing the documentation of a commercial agreement. To the extent the appellants' argument is that in such circumstances the Court may exercise its discretion to refuse the equitable remedy to such a plaintiff, I agree with them. To the extent they say the want of due diligence (or negligence) on the plaintiff's part is an absolute bar, I think their proposition is inconsistent with principle and authority and should be rejected.

J'ai évoqué plus tôt les quatre préalables, ou « obstacles », que le demandeur doit surmonter. Les appelants cherchent à en ajouter un cinquième. La rectification ne devrait pas, affirment-ils, être ouverte à un demandeur qui a été négligent dans l'examen de la documentation relative à un contrat commercial. Dans la mesure où leur argument signifie que, en pareils cas, la Cour peut exercer son pouvoir discrétionnaire de refuser d'accorder la réparation en equity à un tel demandeur, je suis d'accord avec eux. Dans la mesure où ils affirment que l'absence de diligence raisonnable (ou la négligence) d'un demandeur constitue un empêchement absolu, je crois que leur thèse est incompatible avec les principes et les autorités, et qu'elle devrait être rejetée.

The first of the traditional hurdles is that Sylvan (Bell) must show the existence and content of the inconsistent prior oral agreement. Rectification is “[t]he most venerable breach in the parol evidence rule” (Waddams, *supra*, at para. 336). The requirement of a prior oral agreement closes the “floodgate” to unhappy contract makers who simply failed to read the contractual documents, or who now have misgivings about the merits of what they have signed.

The second hurdle is that not only must Sylvan (Bell) show that the written document does not correspond with the prior oral agreement, but that O’Connor either knew or ought to have known of the mistake in reducing the oral terms to writing. It is only where permitting O’Connor to take advantage of the error would amount to “fraud or the equivalent of fraud” that rectification is available. This requirement closes the “floodgate” to unhappy contract makers who simply made a mistake. Equity acts on the conscience of a defendant who seeks to take advantage of an error which he or she either knew or ought reasonably to have known about at the time the document was signed. Mere unilateral mistake alone is not sufficient to support rectification but if permitting the non-mistaken party to take advantage of the document would be fraud or equivalent to fraud, rectification may be available: *Hart, supra*, at p. 630; *Ship M. F. Whalen, supra*, at pp. 126-27.

What amounts to “fraud or the equivalent of fraud” is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that “in this context ‘fraud or the equivalent of fraud’ refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. . . . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself

Selon le premier des obstacles traditionnels, il incombe à Sylvan (Bell) d’établir l’existence et la teneur de l’entente verbale antérieure incompatible. La rectification est [TRADUCTION] « [l’]entorse la plus consacrée à la règle de l’exclusion de la preuve extrinsèque » (Waddams, *op. cit.*, par. 336). La condition exigeant une entente verbale antérieure prévient « l’avalanche de poursuites » de la part de contractants insatisfaits qui ont tout simplement omis de lire les documents contractuels, ou qui éprouvent maintenant des réserves sur le bien-fondé de ce qu’ils ont signé.

Pour franchir le deuxième obstacle, Sylvan (Bell) doit démontrer non seulement que l’écrit ne correspond pas à l’entente verbale antérieure, mais également qu’O’Connor connaissait ou aurait dû connaître l’existence de l’erreur lorsque les conditions convenues verbalement ont été couchées par écrit. Ce n’est que lorsque le fait de permettre à O’Connor de tirer profit de l’erreur constituerait « une fraude ou l’équivalent d’une fraude » qu’il y a ouverture à rectification. Cette exigence prévient l’avalanche de poursuites de la part de contractants insatisfaits qui ont simplement fait une erreur. L’équité agit sur la conscience du défendeur qui cherche à tirer profit d’une erreur dont il connaissait ou aurait raisonnablement dû connaître l’existence au moment où le document a été signé. À elle seule, une erreur unilatérale ne peut justifier la rectification d’un document, mais il peut y avoir ouverture à cette réparation si le fait de permettre à la partie qui n’était pas dans l’erreur de tirer profit du document constitue une fraude ou l’équivalent d’une fraude : *Hart*, précité, p. 630; *Ship M. F. Whalen*, précité, p. 126-127.

Déterminer ce qui constitue « une fraude ou l’équivalent d’une fraude » constitue, bien sûr, une question cruciale. Dans *First City Capital Ltd. c. British Columbia Building Corp.* (1989), 43 B.L.R. 29, madame le juge en chef McLachlin de la Cour suprême de la Colombie-Britannique (maintenant Juge en chef du Canada) a souligné que, [TRADUCTION] « dans ce contexte, “une fraude ou l’équivalent d’une fraude” ne s’entend pas du délit que constituent le dol ou la fraude stricte au sens juridique du terme, mais plutôt à la catégorie plus vaste des fraudes par implication ou fraudes

37

38

39

of the advantage obtained” (p. 37). Fraud in the “wider sense” of a ground for equitable relief “is so infinite in its varieties that the Courts have not attempted to define it”, but “all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken”: *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (Ont. H.C.), at p. 19. See also *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257 (Sask. C.A.), *per* Wakeling J.A.; *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11 (Ont. C.A.); *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351 (Ont. H.C.), *per* Grange J. (as he then was), at pp. 362-63; and Waddams, *supra*, at para. 342.

reconnues en equity [. . .] Dans ce sens plus large, la fraude s’entend également d’opérations qui ne sont pas dolosives, mais à l’égard desquelles le tribunal estime qu’il serait abusif de laisser une personne profiter de l’avantage obtenu » (p. 37). Au « sens plus large » de fraude donnant ouverture à une réparation en equity, la fraude se présente sous [TRADUCTION] « un nombre tellement infini de formes que les tribunaux n’ont pas tenté de la définir », mais « elle vise toutes sortes de manœuvres déloyales et de conduites abusives en matière contractuelle » : *McMaster University c. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (H.C. Ont.), p. 19. Voir également *Montreal Trust Co. c. Maley* (1992), 99 D.L.R. (4th) 257 (C.A. Sask.), le juge Wakeling; *Alampi c. Swartz* (1964), 43 D.L.R. (2d) 11 (C.A. Ont.); *Stepps Investments Ltd. c. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351 (H.C. Ont.), le juge Grange (plus tard juge à la Cour d’appel), p. 362-363, et Waddams, *op. cit.*, par. 342.

40 The third hurdle is that Sylvan (Bell) must show “the precise form” in which the written instrument can be made to express the prior intention (*Hart, supra, per* Duff J., at p. 630). This requirement closes the “floodgates” to those who would invite the court to speculate about the parties’ unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not. The court’s equitable jurisdiction is limited to putting into words that — and only that — which the parties had already orally agreed to.

Suivant le troisième obstacle, Sylvan (Bell) doit démontrer [TRADUCTION] « de façon précise » comment l’écrit peut être formulé pour exprimer l’intention antérieure (*Hart, précité*, le juge Duff, p. 630). Cette exigence prévient « l’avalanche de poursuites » de la part de ceux qui inviteraient les tribunaux à spéculer sur les intentions inexprimées des parties ou à imposer ce qui, a posteriori, semble être un arrangement judicieux, qu’auraient pu conclure les parties mais qu’elles n’ont par ailleurs pas choisi. La compétence des tribunaux en equity se limite à exprimer en mots ce sur quoi — et uniquement ce sur quoi — les parties s’étaient déjà entendues verbalement.

41 The fourth hurdle is that all of the foregoing must be established by proof which this Court has variously described as “beyond reasonable doubt” (*Ship M. F. Whalen, supra*, at p. 127), or “evidence which leaves no ‘fair and reasonable doubt’” (*Hart, supra*, at p. 630), or “convincing proof” or “more than sufficient evidence” (*Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354, at pp. 371-72). The modern approach, I think, is captured by the expression “convincing proof”, i.e., proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and

Le quatrième obstacle oblige à établir tous les éléments susmentionnés en apportant, conformément aux diverses façons dont notre Cour l’a décrite, une preuve [TRADUCTION] « au-delà de tout doute raisonnable » (*Ship M. F. Whalen, précité*, p. 127), une preuve [TRADUCTION] « qui ne laisse aucun “doute juste et raisonnable” » (*Hart, précité*, p. 630), une « preuve convaincante » ou une « preuve [. . .] plus que suffisante » (*Augdome Corp. c. Gray*, [1975] 2 R.C.S. 354, p. 371-372). Selon moi, l’approche moderne est bien décrite par l’expression « preuve convaincante », c.-à-d. une preuve qui peut être bien

with hesitation scrapes over the low end of the civil “more probable than not” standard.

Some critics argue that anything more demanding than the ordinary civil standard of proof is unnecessary (e.g., Waddams, *supra*, at para. 343), but, again, the objective is to promote the utility of written agreements by closing the “floodgate” against marginal cases that dilute what are rightly seen to be demanding preconditions to rectification.

It was formerly held that it was not sufficient if the evidence merely comes from the party seeking rectification. In *Ship M. F. Whalen*, *supra*, Duff J. (as he then was) said, at p. 127, “[s]uch parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties”. Modern practice has moved away from insistence on documentary corroboration (Waddams, *supra*, at para. 337; Fridman, *supra*, at p. 879). In some situations, documentary corroboration is simply not available, but if the parol evidence is corroborated by the conduct of the parties or other proof, rectification may, in the discretion of the court, be available.

It is convenient at this point to deal with the trial judge’s findings in relation to these traditional requirements. I will then turn to the appellants’ proposed fifth precondition — due diligence on the part of the plaintiff.

(1) The Existence and Content of the Prior Oral Agreement

The appellants’ principal argument against rectification is that the alleged prior oral agreement is void for uncertainty. Reliance is placed on *I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd.* (1994), 53 B.C.A.C. 72, where rectification of an agreement to purchase a recreational vehicle park was refused because, *per* Finch J.A. (now C.J.B.C.), at para. 7, the parties never agreed on “the precise location of

inférieure à la norme applicable en matière criminelle, mais qui excède toutefois la preuve qui satisfait péniblement à la norme de la « prépondérance des probabilités » applicable en matière civile.

Certains critiques avancent qu’il est inutile de recourir à une norme de preuve plus exigeante que celle ordinairement applicable en droit civil (par exemple, Waddams, *op. cit.*, par. 343), mais une fois de plus, l’objectif est de renforcer l’utilité des ententes écrites en prévenant une « avalanche » d’affaires limites qui affaibliraient des exigences perçues à juste titre comme de rigoureux préalables à la rectification.

Il a déjà été jugé que la preuve était insuffisante si elle émanait seulement de la partie demandant la rectification. Dans l’arrêt *Ship M. F. Whalen*, précité, p. 127, le juge Duff a dit qu’[TRADUCTION] « [u]n tel témoignage oral doit être adéquatement étayé par des éléments de preuve documentaire et par des éléments résultant de la conduite des parties ». La pratique moderne a cessé d’insister sur la présentation d’éléments de preuve documentaire corroborants (Waddams, *op. cit.*, par. 337; Fridman, *op. cit.*, p. 879). Dans certains cas, il est tout simplement impossible d’apporter une telle preuve, mais si le témoignage oral est corroboré par la conduite des parties ou par une autre preuve, le tribunal peut, à son appréciation, accorder la rectification.

Il convient maintenant d’examiner les constatations du juge de première instance au sujet de ces exigences traditionnelles. Je me pencherai ensuite sur le cinquième préalable proposé par les appelants, à savoir l’exercice de diligence raisonnable par l’auteur de la demande.

(1) L’existence et la teneur de l’entente verbale antérieure

L’argument principal des appelants à l’encontre de la rectification est que l’entente verbale antérieure est nulle pour cause d’incertitude. Ils invoquent l’arrêt *I.C.R.V. Holdings Ltd. c. Tri-Par Holdings Ltd.* (1994), 53 B.C.A.C. 72, dans lequel la Cour d’appel de la Colombie-Britannique a refusé d’accorder la rectification d’une convention d’achat d’un terrain de caravaning parce que, de

42

43

44

45

the eastern boundary”, and *Gordeyko v. Edmonton* (1986), 45 Alta. L.R. (2d) 201 (Q.B.), where Stratton J. (as he then was) found the evidence uncertain about a notice period envisaged by the prior oral agreement. See also *Kerr v. Cunard* (1914), 16 D.L.R. 662 (N.B.S.C.). Appellants’ counsel quotes Lord Denning’s “pithy” observation that: “[a] mistake made by one party to the knowledge of the other is a ground for avoiding a contract, but not for making one” (*Byrnlea Property Investments Ltd. v. Ramsay*, [1969] 2 Q.B. 253 (C.A.), at p. 265).

l’avis du juge Finch (maintenant Juge en chef de la Colombie-Britannique), les parties ne s’étaient jamais entendues sur [TRADUCTION] « l’emplacement précis de la limite est » (par. 7), et l’arrêt *Gordeyko c. Edmonton* (1986), 45 Alta. L.R. (2d) 201 (B.R.), où le juge Stratton (plus tard juge à la Cour d’appel) a conclu au caractère incertain de la preuve relative au délai de préavis envisagé par l’entente verbale antérieure. Voir également l’affaire *Kerr c. Cunard* (1914), 16 D.L.R. 662 (C.S.N.-B.). L’avocat des appelants a cité l’observation « lapidaire » suivante de lord Denning : [TRADUCTION] « [l]’erreur commise par une partie, au su de l’autre, est un motif justifiant de résoudre un contrat, non d’en conclure un » (*Byrnlea Property Investments Ltd. c. Ramsay*, [1969] 2 Q.B. 253 (C.A.), p. 265).

46 I agree with the appellants that on this point the trial judge’s reasons are somewhat unsatisfactory, but this appears to be because the “uncertainty” argument now made against rectification was not before him. The issue of uncertainty of subject matter was raised neither in the pleadings nor at trial. The trial judge directed his reasons to the points that he believed were in controversy. As to the appellants’ new arguments, one may echo the words of James, V.C., in *Rumble v. Heygate* (1870), 18 W.R. 749 (Ch.), who said, at p. 750, that the objections to the agreement in that case on the basis of uncertainty of quantity of land and of its site “are mere shadows which vanish when examined by the light of common sense”.

Je reconnais avec les appelants que, sur ce point, les motifs du juge de première instance sont quelque peu insatisfaisants, mais cela semble s’expliquer par le fait qu’on ne lui avait pas présenté l’argument fondé sur « l’incertitude » plaidé devant nous à l’encontre de la rectification. La question de l’incertitude concernant l’objet n’a été soulevée ni dans les actes de procédure, ni au procès. Dans ses motifs, le juge de première instance s’est attaché aux points qu’il estimait litigieux. Relativement aux nouveaux arguments des appelants, il convient de rappeler les propos du vice-chancelier James dans *Rumble c. Heygate* (1870), 18 W.R. 749 (Ch.), où ce dernier a dit, à la p. 750, à l’égard des objections formulées dans cette affaire à l’encontre de la validité de l’entente, sur le fondement de l’incertitude caractérisant l’emplacement et la superficie des terrains, elles [TRADUCTION] « ne sont rien d’autre que des ombres qui se dissipent sous la lumière du sens commun ».

47 The Court should attempt to uphold the parties’ bargain where the terms can be ascertained with a reasonable level of comfort, i.e., convincing proof. Here the trial judge predicated his award of compensatory damages on the finding that the optioned land could accommodate 58 single family houses located along the 480 yard length of the 18th fairway. There is no argument about the 480 yards. O’Connor himself plucked the 480 figure from the length of play listed on the Sylvan Lake Golf

La Cour doit tenter de maintenir la validité du marché conclu par les parties lorsqu’il est possible d’en dégager les conditions avec un degré de certitude raisonnable, c.-à-d. si on présente une preuve convaincante. En l’espèce, le juge de première instance a fondé sa décision accordant des dommages-intérêts compensatoires sur la conclusion que le terrain visé par l’option permettait la construction de 58 maisons unifamiliales situées le long des 480 verges du 18^e trou. Personne ne conteste

Club score card. O'Connor's number for the width of the development (110) may also be accepted. The issue is whether the number was intended to express yards or feet. The trial judge appears to have concluded that the dispute about the depth of the residential development (which is all that divided the parties) came down to a simple choice between Bell's version (Plan A) and O'Connor's version (Plan B). Both plans were predicated on the length of the 18th fairway, namely 480 yards. Plan B, which O'Connor had described in the document, contemplated a single row of houses on a development plan 110 *feet* deep. Bell's Plan A was based on two rows of housing separated by a road allowance, in a configuration similar to that shown in the aerial photo of the Bayview development discussed by Bell and O'Connor at their December 16-17 meeting. Plan A called for a depth of about 110 *yards*. If Plan B's 110-*foot* depth is tripled to 110 *yards*, the acreage under option would be roughly tripled from about 3.6 acres (Plan B) to about 10.9 acres (Plan A), which accommodates the 58 lots plus the standard municipal road allowance. The problem in *I.C.R.V. Holdings, supra*, was that the parties never agreed on the boundary. Here the trial judge concluded that there *was* agreement even though the parties did not express themselves to each other in lawyerly language. This not infrequently happens: *Bloom v. Averbach*, [1927] S.C.R. 615, *per* Lamont J., at p. 621:

It is suggested that had the letters been handed to a lawyer to prepare a formal contract therefrom, he would not have been able to determine what assets were to be included in the term "building, machinery and fixtures," or what were to be covered by "stock, etc." It may be that he would not, but that is not the test. The test is, did the parties themselves clearly understand what was comprised in each. In other words were their minds *ad idem* as to these expressions? [Emphasis added.]

la longueur de 480 verges. O'Connor lui-même a tiré le chiffre 480 de la distance indiquée sur la carte de pointage utilisée au terrain de golf de Sylvan Lake. Le chiffre mentionné par O'Connor quant à la largeur du complexe (110) peut aussi être accepté. Il s'agit de décider si ce chiffre exprimait une profondeur en verges ou en pieds. Le juge de première instance semble avoir conclu que le différend au sujet de la profondeur du complexe domiciliaire (unique objet de désaccord entre les parties) se résumait à un simple choix entre la version de Bell (le « plan A ») et celle d'O'Connor (le « plan B »). Les deux plans étaient basés sur la longueur du 18^e trou, soit 480 verges. Le plan B, qu'O'Connor avait décrit dans le document, envisageait une seule rangée de maisons selon un plan d'aménagement de 110 *pieds* de profondeur. Le plan A de Bell envisageait deux rangées de maisons séparées par une emprise routière, selon un aménagement analogue à celui illustré par la photographie aérienne du complexe de Bayview dont Bell et O'Connor avaient discuté au cours de leur rencontre des 16 et 17 décembre. Suivant le plan A, la profondeur était d'environ 110 *verges*. Si la profondeur de 110 *pieds* du plan B était triplée, passant à 110 *verges*, le bien-fonds visé par l'option triplerait grosso modo de superficie, passant d'environ 3,6 acres (plan B) à environ 10,9 acres (plan A), et pourrait accueillir les 58 lots plus l'emprise routière municipale standard. Dans l'affaire *I.C.R.V. Holdings*, précitée, le problème était que les parties ne s'étaient jamais entendues sur les limites du bien-fonds. En l'espèce, le juge de première instance a conclu qu'il y *avait eu* accord, même si les parties ne s'étaient pas exprimées en jargon juridique. C'est une situation qui n'est pas rare : *Bloom c. Averbach*, [1927] R.C.S. 615, le juge Lamont, p. 621 :

[TRADUCTION] On prétend que, si les lettres avaient été remises à un avocat pour qu'il prépare un contrat formel à partir de celles-ci, il aurait été incapable de déterminer quels éléments d'actif devaient être inclus dans l'expression « bâtiments, matériel et accessoires fixes » ou ce qui était visé par les mots « stock, etc. » Peut-être n'aurait-il pas été capable de le faire, mais il ne s'agit pas du critère applicable. Voici quel est ce critère : Les parties elles-mêmes comprenaient-elles clairement ce qui était inclus dans chaque expression? En d'autres termes, y avait-il accord des volontés au sujet de ces expressions? [Je souligne.]

48 The trial judge thus found that the parties had made a verbal agreement with reference to a residential development along the 18th hole. It was more than an agreement to agree. He concluded that there was a definite project in a definite location to which O'Connor and Bell had given their definite assent.

49 Although the parties did not discuss a metes and bounds description, they were working on a defined development proposal. O'Connor cannot complain if the numbers he inserted in clause 18 (110 x 480) are accepted and confirmed. The issue, then, is the error created by his apparently duplicitous substitution of feet for yards in one dimension. We know the 480 must be yards because it measures the 18th fairway. If the 110 is converted from feet to yards, symmetry is achieved, certainty is preserved and Bell's position is vindicated.

(2) Fraud or Conduct Equivalent to Fraud

50 The notion of "*equivalent* to fraud" as distinguished from fraud itself, is often utilized where "the court is unwilling to go so far as to find actual knowledge on the side of the party seeking enforcement" (Waddams, *supra*, at para. 342). The trial judge had no such hesitation in this case. He characterized O'Connor's actions as "fraudulent, dishonest and deceitful" (para. 114).

51 The trial judge was persuaded not only of the terms of the prior oral agreement and of Bell's mistake but "beyond any reasonable doubt" of O'Connor's knowledge of that mistake. He states (at para. 79):

This court is satisfied beyond any reasonable doubt that O'Connor knew of Bell's mistake and he chose to permit Bell to sign it in the mistaken belief that it represented the verbal agreement. He did so with the full intention that he would in the future rely on the terms of the Agreement to thwart or reduce any plan by

Le juge de première instance a donc estimé que les parties s'étaient entendues verbalement à l'égard d'un complexe domiciliaire le long du 18^e trou. Il ne s'agissait pas d'un simple avant-contrat. Il a conclu à l'existence d'un projet défini et devant être réalisé à un endroit déterminé dont O'Connor et Bell avaient convenu précisément.

Bien que les parties n'aient pas discuté de la description technique des lieux, elles travaillaient à un projet d'aménagement défini. O'Connor ne saurait se plaindre du fait que les chiffres qu'il a inscrits à la clause 18 (110 x 480) sont acceptés et confirmés. La question, par conséquent, est l'erreur créée par sa substitution apparemment frauduleuse, relativement à une des dimensions, d'une mesure en pieds à une mesure en verges. Nous savons que le chiffre 480 désigne des verges puisqu'il correspond à la distance du 18^e trou. Si le chiffre 110 désigne non pas des pieds mais des verges, il y a alors symétrie des unités de mesure, la certitude est maintenue et la thèse de Bell est confirmée.

(2) Fraude ou conduite équivalant à fraude

La notion de conduite « *équivalant* à fraude », par opposition à la fraude en soi, est souvent utilisée lorsque [TRADUCTION] « le tribunal n'est pas convaincu que la partie qui demande l'exécution a réellement eu connaissance de l'erreur » (Waddams, *op. cit.*, par. 342). Le juge de première instance n'a aucunement hésité à conclure de la sorte en l'espèce. Il a qualifié les actions d'O'Connor de [TRADUCTION] « frauduleuses, malhonnêtes et dolosives » (par. 114).

Non seulement le juge de première instance était-il convaincu des conditions de l'entente verbale antérieure ainsi que de l'erreur de Bell, mais il était également convaincu « hors de tout doute raisonnable » qu'O'Connor connaissait l'existence de cette erreur. Il a dit ceci, au par. 79 :

[TRADUCTION] La cour est convaincue hors de tout doute raisonnable qu'O'Connor connaissait l'existence de l'erreur de Bell et qu'il a choisi de laisser Bell signer la Convention alors que ce dernier croyait erronément que le document représentait l'entente verbale. Il a agi ainsi avec la nette intention d'invoquer

Bell to develop an increased area of the golf course for residential development.

O'Connor thus fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. He knew that Bell would not sign an agreement without the option for sufficient land to create the "Bayview" layout development with two rows of housing as specified in the prior oral contract. O'Connor therefore knew when Bell signed the document that he had not detected the substitution of 110 feet for 110 yards. O'Connor knowingly snapped at Bell's mistake "to thwart or reduce any plan by Bell to develop an increased area of the golf course for residential development". Bell's loss would be O'Connor's gain, as O'Connor (Performance) would come into sole ownership of the optioned land as of December 31, 1994.

Although on occasion the trial judge describes O'Connor's conduct as "equivalent to a fraud", and elsewhere he describes it as actual fraud, his reasons taken as a whole can only be characterized as a finding of actual fraud.

(3) Precise Terms of Rectification

It follows from the foregoing that "the precise form" in which the written document can be made to conform to the oral agreement would be simply to change the word "feet" in the phrase "one hundred ten (110) *feet* in width" to "yards".

(4) Existence of "Convincing Proof"

The trial judge made his key findings in respect of the prior oral agreement, Bell's unilateral mistake and O'Connor's knowledge of that mistake to a standard of "beyond any reasonable doubt".

ultérieurement les conditions de la Convention pour contrecarrer ou limiter tout projet de Bell d'affecter une partie plus grande du terrain de golf à la construction résidentielle.

O'Connor a donc fait une assertion inexacte et frauduleuse en laissant croire que l'écrit reflétait fidèlement les conditions prévues par l'entente verbale antérieure. Il savait que Bell ne signerait pas un accord ne comportant pas l'option d'acquérir suffisamment de terrain pour réaliser l'aménagement de type « Bayview » comptant deux rangées de maisons qui avait été précisé dans le contrat verbal antérieur. Par conséquent, O'Connor savait que, au moment où il a signé le document, Bell n'avait pas décelé la substitution de la mesure 110 pieds à la mesure 110 verges. O'Connor a sciemment profité de l'erreur de Bell pour [TRADUCTION] « contrecarrer ou limiter tout projet de Bell d'affecter une partie plus grande du terrain de golf à la construction résidentielle ». La perte de Bell se traduirait par un gain pour O'Connor, puisque ce dernier (Performance) allait devenir seul propriétaire du terrain visé par l'option le 31 décembre 1994.

Bien que, à certains endroits, le juge de première instance ait décrit la conduite d'O'Connor comme « équivalant à une fraude » alors qu'ailleurs il l'a qualifiée de véritable fraude, considérés globalement, ses motifs ne peuvent être caractérisés que comme une constatation de véritable fraude.

(3) Formulation précise de la rectification

Il ressort de ce qui précède que la [TRADUCTION] « façon précise » dont peut être formulé l'écrit pour qu'il soit conforme à l'entente verbale antérieure consiste simplement à remplacer le mot « pieds » par le mot « verges » dans la phrase [TRADUCTION] « cent dix (110) *pieds* de largeur ».

(4) Existence d'une « preuve convaincante »

C'est au regard de la norme de la preuve « hors de tout doute raisonnable » que le juge de première instance a tiré ses conclusions clés à l'égard de l'entente verbale antérieure, de l'erreur unilatérale de Bell et de la connaissance par O'Connor de cette erreur.

52

53

54

55

56 He also found that Bell's version of the verbal agreement was sufficiently corroborated on significant points by other witnesses (including his wife, his former partner, his lawyer and, subsequently, the development consultants), and documents (including his lawyer's notes and the plan of the Bayview Golf Course development discussed in mid-December 1989).

D. *Bell's Lack of Due Diligence*

57 The appellants seek, in effect, to add a fifth hurdle (or condition precedent) to the availability of rectification. A plaintiff, they say, should be denied such a remedy unless the error in the written document could not have been discovered with due diligence.

58 O'Connor says that Bell's failure to read clause 18 and note the mixture of yards and feet should be fatal to his claim because the Court ought not to assist businesspersons who are negligent in protecting their own interests. Alternatively, the effective cause of Bell's loss is not the fraudulent document but Bell's failure to detect the fraud when he had an opportunity to do so.

59 I agree that Bell, an experienced businessman, ought to have examined the text of clause 18 before signing the document. The terms of clause 18 were clear on their face (even though many readers might have misread a description of land that mixed units of measurement as clause 18 did here). He had time to review the document with his lawyer. He did so. Changes were requested. He did not catch the substitution of 110 feet for 110 yards; indeed, he says he did not read clause 18 at all.

60 The trial judge, at para. 76, accepted the evidence of Bell's lawyer who admitted that he had not directed his mind to the limitations of the size of the development parcel found in clause 18, nor had he made any note of bringing those to

Il a aussi conclu que la version donnée par Bell de l'entente verbale était suffisamment corroborée sur des aspects importants par d'autres témoins (dont son épouse, son ancien associé, son avocat et, par la suite, les consultants en aménagement) ainsi que par des documents (notamment les notes de son avocat et le plan du complexe du terrain de golf Bayview discuté vers la mi-décembre 1989).

D. *Le défaut de diligence raisonnable de Bell*

Dans les faits, les appelants cherchent à subordonner la rectification à un cinquième obstacle (ou préalable). Selon eux, cette réparation doit être refusée, sauf dans les cas où l'erreur que comporte l'écrit n'aurait pu être décelée même si l'intéressé avait fait preuve de diligence raisonnable.

O'Connor prétend que le fait que Bell n'ait pas lu la clause 18 et constaté qu'on y utilisait une mesure en verges et une autre en pieds devrait être fatal à sa demande, parce que la Cour ne devrait pas venir en aide aux gens d'affaires qui se montrent négligents dans la protection de leurs intérêts. Par ailleurs, il affirme que la cause réelle de la perte de Bell n'est pas le document frauduleux, mais l'omission de ce dernier de déceler la fraude quand il en a eu l'occasion.

Je reconnais que Bell, homme d'affaires expérimenté, aurait dû examiner le texte de la clause 18 avant de signer le document. Les termes de la clause 18 étaient clairs à première vue (encore que bien des gens auraient pu mal interpréter une description technique où sont utilisées diverses unités de mesure, comme c'est le cas à la clause 18 en l'espèce). Il a eu le temps d'examiner le document avec son avocat. Il l'a fait. Des modifications ont été demandées. Il n'a pas remarqué qu'on avait substitué 110 pieds à 110 verges; de fait, il dit ne pas avoir lu du tout la clause 18.

Au paragraphe 76 de ses motifs, le juge de première instance a accepté le témoignage de l'avocat de Bell, qui a admis ne pas s'être attardé aux limites prévues à la clause 18 relativement à l'étendue de la parcelle devant être aménagée, ni s'être mis une

Bell's attention which would have been his normal practice.

He could offer no explanation for why he had not done so other than the fact that his focus on receipt of the Agreement signed by Bell was to ensure the completion and registration of documentation to facilitate the closing of [the purchase] on or before December 31, 1989. This court accepts the evidence offered by Mr. Hancock and that of Bell that they at no time discussed the description of property contained in clause 18.

It is undoubtedly true that courts ought to hold commercial entities to a reasonable level of due diligence in documenting their transactions. Otherwise, written agreements will lose their utility and commercial life will suffer. Rectification should not become a belated substitute for due diligence.

On the other hand, most cases of unilateral mistake involve a degree of carelessness on the part of the plaintiff. A diligent reading of the written document would generally have disclosed the error that the plaintiff, after the fact, seeks to have corrected. The mistaken party will often have failed to read the document entirely, or may have read it too hastily or without parsing each word. As the *American Restatement of the Law, Second: Contracts (2d)* (1981) points out in its commentary under s. 157 ("Effect of Fault of Party Seeking Relief"), "since a party can often avoid a mistake by the exercise of such care, the availability of relief would be severely circumscribed if he were to be barred by his negligence". Comment B discusses "[f]ailure to read writing". "Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms." But this proposition is qualified by that Comment's further statement that the "exceptional rule" in s. 157 (which permits rectification or "reformation" of the contract) applies only where there has been an agreement that preceded the writing. "In such a case, a party's negligence in failing to read the writing

note lui rappelant de les porter à l'attention de M. Bell, comme il l'aurait fait normalement :

[TRADUCTION] Il n'a pu expliquer son omission de le faire autrement que par le fait que, après avoir reçu la Convention signée par Bell, il s'était concentré sur le parachèvement et l'enregistrement de la documentation pour faciliter la clôture de [l'acquisition] au plus tard le 31 décembre 1989. La cour accepte le témoignage de M. Hancock et celui de Bell portant qu'ils n'ont à aucun moment parlé de la description technique de la propriété figurant à la clause 18.

Il est incontestable que les tribunaux doivent exiger des entités commerciales qu'elles fassent preuve d'un niveau raisonnable de diligence lorsqu'elles constatent leurs opérations par écrit. Autrement, les contrats écrits perdront leur utilité et les échanges commerciaux en souffriront. La rectification ne doit pas devenir un substitut tardif à l'exercice de diligence raisonnable.

Par ailleurs, la plupart des affaires d'erreur unilatérale impliquent un certain manque de diligence de la part du demandeur. Une lecture attentive du texte du contrat aurait normalement permis de déceler l'erreur dont le demandeur sollicite, après coup, la correction. La partie invoquant l'erreur aura souvent omis de lire le document en entier ou bien elle l'aura lu trop rapidement ou sans en avoir bien pesé chaque mot. Comme on le souligne dans l'ouvrage américain *Restatement of the Law, Second: Contracts (2d)* (1981), au commentaire accompagnant l'art. 157 (« Effect of Fault of Party Seeking Relief »), [TRADUCTION] « étant donné qu'une partie peut souvent éviter une erreur en faisant preuve d'une telle diligence, l'ouverture du recours serait gravement restreinte si la négligence de la partie l'empêchait d'exercer ce recours ». Le commentaire B traite de l'[TRADUCTION] « [o]mission de lire un écrit ». [TRADUCTION] « En règle générale, quiconque donne son assentiment à un écrit est présumé en connaître la teneur et ne peut se soustraire aux obligations qui lui incombent aux termes de ce document simplement en prétendant ne pas les avoir lus; son assentiment est réputé couvrir autant les clauses inconnues que les clauses connues. » Cette proposition est toutefois assortie de la réserve suivante, précisant que la [TRADUCTION] « règle

61

62

does not preclude reformation if the writing does not correctly express the prior agreement”.

63 One reason why the defence of contributory negligence or want of due diligence is not persuasive in a rectification case is because the plaintiff seeks no more than enforcement of the prior oral agreement to which the defendant has already bound itself.

64 The commentary in the American *Restatement* is consistent with the Canadian case law. For example, in *Beverly Motel (1972) Ltd. v. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757 (B.C.S.C.), the vendor signed documents, already signed by the purchaser, in the office of the purchaser’s solicitor that conveyed two lots, the single lot (with a motel) that the vendor had offered for sale and the adjacent residentially zoned vacant lot. Of that group of individuals, only the purchaser noted the error (on the day of signing) and he was “pleased and surprised” another lot had been included. He snapped at the offer but he had played no role in inducing the mistake. Gould J. conceded (at pp. 758-59), “[i]t is quite true that if they [the three shareholders of the vendor] had read the legal description in the documents with any care, they would have caught the error. Obviously they did not so read the legal description, and that is understandable, although careless, because they were with their own solicitor, present in the purchaser’s solicitor’s office, and both solicitors were obviously giving the impression that the final documents were in order and ready for signature”. Gould J. ordered that the second lot be conveyed back to the original vendor because it was “unfair, unjust or unconscionable” (p. 760) for the purchaser “to hold the legal advantage he ha[d] gained” (p. 759). Gould J. acknowledged that the presence of a solicitor can help explain why a party might not himself read the written document. In the present case, Bell left the documentation up to the lawyers without appreciating that he had given his lawyer

exceptionnelle » de l’art. 157 (laquelle permet la rectification ou la « réformation » du contrat) ne s’applique que lorsqu’une entente a précédé l’écrit. [TRADUCTION] « Dans un tel cas, la négligence dont a fait montre une partie en ne lisant pas l’écrit ne fait pas obstacle à la réformation de ce document s’il n’exprime pas adéquatement l’entente préalable ».

L’une des raisons pour lesquelles, dans les affaires de rectification, le moyen de défense fondé sur la négligence contributive ou le défaut de diligence raisonnable n’est pas convainquant est le fait que le demandeur ne réclame rien de plus que l’exécution de l’entente verbale antérieure par laquelle le défendeur était déjà lié.

Le commentaire formulé dans l’ouvrage américain *Restatement* est compatible avec la jurisprudence canadienne. Par exemple, dans *Beverly Motel (1972) Ltd. c. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757 (C.S.C.-B.), le vendeur a signé, dans le bureau de l’avocat de l’acquéreur, des documents que ce dernier avait déjà signés et qui transféraient la propriété de deux lots, le lot particulier (avec un motel) que le vendeur avait offert en vente et le lot adjacent, qui était vacant et zoné résidentiel. De toutes ces personnes, seul l’acquéreur a (le jour de la signature) remarqué l’erreur et il était [TRADUCTION] « heureux et étonné » de voir qu’un autre lot avait été inclus dans l’opération. L’acquéreur, qui n’a pas manqué de saisir l’occasion, n’avait toutefois joué aucun rôle dans la création de cette erreur. Le juge Gould a reconnu (aux p. 758-759) qu’[TRADUCTION] « [i]l était vrai que s’ils [les trois actionnaires du vendeur] avaient fait un peu attention en lisant la description officielle dans les documents, ils auraient décelé l’erreur. Ils ne l’ont manifestement pas lue avec attention et, quoique leur omission témoigne d’un manque de la diligence, elle est compréhensible puisqu’ils étaient accompagnés de leur propre avocat, qui était présent dans le bureau de l’avocat de l’acquéreur, et que les deux avocats donnaient clairement l’impression que les documents définitifs étaient en règle et prêts à être signés ». Le juge Gould a ordonné la restitution du deuxième lot au vendeur original, car il était [TRADUCTION] « injuste, inéquitable ou abusif » (p. 760) de permettre « à

insufficient information to check O'Connor's figures. He had, at that time, no reason to question O'Connor's integrity.

If want of due diligence had been a good defence to rectification, relief would likely have been refused in *Big Quill Resources Inc. v. Potash Corp. of Saskatchewan* (2001), 203 Sask. R. 298, 2001 SKCA 31; *Stepps Investments, supra, per* Grange J., at p. 362; *Prince Albert Credit Union v. Diehl*, [1987] 4 W.W.R. 419 (Sask. Q.B.); *Montreal Trust, supra*, at p. 262; *Windjammer Homes Inc. v. Generation Enterprises* (1989), 43 B.L.R. 315 (B.C.S.C.).

E. Discretionary Relief

I conclude, therefore that due diligence on the part of the plaintiff is not a condition precedent to rectification. However, it should be added at once that rectification is an equitable remedy and its award is in the discretion of the court. The conduct of the plaintiff is relevant to the exercise of that discretion. In a case where the court concludes that it would be unjust to impose on a defendant a liability that ought more properly to be attributed to the plaintiff's negligence, rectification may be denied. That was not the case here.

F. Fraud

There is, on the facts of this case, a more fundamental reason why the appellants' complaint about Bell's lack of due diligence provides no defence. O'Connor did more than "snap" at a business partner's mistake. O'Connor undertook as part of the verbal agreement to have a document prepared that set out its terms. According to the

l'acquéreur » de conserver l'avantage juridique qu'il venait de recevoir » (p. 759). Le juge Gould a reconnu que la présence d'un avocat pourrait permettre d'expliquer pourquoi une partie peut ne pas avoir lu elle-même le texte d'un document. En l'espèce, Bell a laissé aux avocats le soin de s'occuper des documents, sans s'apercevoir qu'il n'avait pas donné suffisamment d'information à son propre avocat pour lui permettre de vérifier les chiffres d'O'Connor. Il n'avait, à l'époque, aucune raison de mettre en doute l'intégrité d'O'Connor.

Si le défaut de diligence raisonnable avait été un bon moyen de défense à l'encontre d'une demande en rectification, cette réparation aurait probablement été refusée dans les affaires *Big Quill Resources Inc. c. Potash Corp. of Saskatchewan* (2001), 203 Sask. R. 298, 2001 SKCA 31; *Stepps Investments, précitée*, le juge Grange, p. 362; *Prince Albert Credit Union c. Diehl*, [1987] 4 W.W.R. 419 (B.R. Sask.); *Montreal Trust, précitée*, p. 262; *Windjammer Homes Inc. c. Generation Enterprises* (1989), 43 B.L.R. 315 (C.S.C.-B.).

E. Réparation à caractère discrétionnaire

En conséquence, je conclus que la diligence raisonnable de la part du demandeur n'est pas un préalable au prononcé d'une ordonnance de rectification. Toutefois, je m'empresse d'ajouter que la rectification est une réparation en equity et que la décision de l'accorder ou non relève du pouvoir discrétionnaire de la cour. La conduite du demandeur est pertinente dans l'exercice de ce pouvoir discrétionnaire. Lorsque le tribunal conclut qu'il serait injuste d'imputer au défendeur une responsabilité qu'il convient plutôt d'attribuer à la négligence du demandeur, il peut refuser d'ordonner la rectification. Ce n'est pas le cas en l'espèce.

F. Fraude

À la lumière des faits de l'espèce, il existe une raison plus fondamentale expliquant pourquoi l'argument des appelants fondé sur le défaut de diligence raisonnable de Bell ne constitue pas un moyen de défense. O'Connor n'a pas fait que « saisir » l'occasion et profiter de l'erreur d'un associé commercial. Dans l'entente verbale

65

66

67

trial judge, he not only breached that term, it became part of his fraudulent scheme to have the document wrongly state the terms of the option, to fraudulently misrepresent to Bell that it did accurately set out their verbal agreement, to allow Bell to sign it when O'Connor knew Bell was mistaken in doing so, then to delay any response to Bell's development proposals (and thus bring the error to Bell's attention) until it was almost too late for the development to proceed. O'Connor admitted providing his lawyer with the erroneous metes and bounds description in clause 18. It should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected.

antérieure, O'Connor s'était engagé à faire préparer un document qui en énoncerait les modalités. Selon le juge de première instance, non seulement O'Connor a-t-il violé cet engagement, mais en outre, dans le cadre de son stratagème frauduleux, il a fait en sorte que le document énonce erronément les modalités de l'option, il a laissé croire à Bell, de manière inexacte et frauduleuse, que le document reflétait adéquatement leur entente verbale, il a laissé Bell le signer tout en sachant que ce dernier commettait une méprise en le signant, puis il a tardé à répondre aux propositions d'aménagement de celui-ci (et ainsi évité d'attirer l'attention de ce dernier sur l'erreur) jusqu'à ce qu'il soit devenu presque trop tard pour que le projet de construction puisse être réalisé. O'Connor a admis avoir donné à son avocat la description technique erronée qui figure à la clause 18. À mon avis, il ne devrait pas être autorisé à plaider qu'il ne doit pas être tenu responsable de ce qui est survenu par la suite parce que sa fraude était tellement évidente qu'elle aurait dû être décelée.

68 “[F]raud ‘unravels everything’”: *Farah v. Barki*, [1955] S.C.R. 107, at p. 115 (Kellock J. quoting Farwell J. in *May v. Platt*, [1900] 1 Ch. 616, at p. 623).

[TRADUCTION] « La fraude “corrompt tout” » : *Farah c. Barki*, [1955] R.C.S. 107, p. 115 (le juge Kellock citant les propos du juge Farwell dans *May c. Platt*, [1900] 1 Ch. 616, p. 623).

69 The appellants' concept of a due diligence defence in a fraud case was rejected over 125 years ago by Lord Chelmsford L.C. who said, “when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, ‘You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty’”: *Central R. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99, at pp. 120-21.

Le type de moyen de défense fondé sur la diligence raisonnable que préconisent les appelants dans les affaires de fraude été rejeté dans les termes suivants, il y a plus de 125 ans, par le lord chancelier Chelmsford : [TRADUCTION] « dès qu'il est établi qu'il y a eu assertion inexacte et frauduleuse ou dissimulation intentionnelle ayant induit une personne à conclure un contrat, ne peut alors être opposé à la demande présentée par cette personne en vue d'être déliée du contrat l'argument que celle-ci aurait pu découvrir la vérité par un examen adéquat. Cette personne a le droit de répondre à son adversaire : “Vous, en particulier, qui avez déclaré des faussetés, ou avez caché la vérité, dans le but de m'inciter à conclure le contrat, ne pouvez m'accuser d'avoir manqué de prudence parce que je me suis fondé implicitement sur votre intégrité et votre honnêteté” » : *Central R. Co. of Venezuela c. Kisch* (1867), L.R. 2 H.L. 99, p. 120-121.

Lord Chelmsford's strictures were quoted and applied by Southin J. (as she then was) in *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322 (S.C.), where she observed that "[c]arelessness on the part of the victim has never been a defence to an action for fraud" (p. 335).

Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.

And, in my opinion, a good thing, too. There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault, I fool you". Such a defence should not be countenanced from a rogue. [p. 336]

See also *Dalon v. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89 (B.C.S.C.). To the same effect is Spencer Bower and Turner, *The Law of Actionable Misrepresentation* (3rd ed. 1974), at p. 218:

A man who has told even an innocent untruth, by which he has induced another to alter his position, — much more one who has fraudulently lied with that object and result, — has debarred himself from ever complaining in a court of justice, any more than he could in a court of morals, that the representee acted on the faith of his misstatement in the manner in which he, the representor, intended that he should. He can never be heard to resent the fact that another believed the lie that was told for the very purpose of inspiring that belief, or plead as an excuse that, if the representee had not been such a fool as to trust such a knave, no harm would have been done.

The appellants having failed to establish that due diligence on the part of the plaintiff is a precondition to rectification, or to shake the trial judge's findings with respect to the traditional preconditions

Les restrictions énoncées par lord Chelmsford ont été citées et appliquées par madame le juge Southin (maintenant juge à la Cour d'appel) dans *United Services Funds (Trustee of) c. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322 (C.S.), où elle a fait remarquer que [TRADUCTION] « [l]a négligence de la victime ne constitue jamais un moyen de défense dans une action pour fraude » (p. 355).

[TRADUCTION] Dès que le demandeur prend connaissance de la fraude, il doit atténuer ses pertes, mais, à mon avis, tant qu'il n'en connaît pas l'existence, il ne se pose en droit aucune question concernant la diligence raisonnable ou quoi que ce soit d'autre s'y apparentant.

Et, à mon avis, il s'agit aussi d'une bonne chose. Il est bien possible que la société civilisée soit menacée par des périls beaucoup plus grands que la malhonnêteté endémique. Mais je ne vois rien qui contribuerait davantage à la malhonnêteté qu'une règle de droit qui exigerait que nous soyons continuellement sur nos gardes contre les escrocs, au risque de nous faire répondre, en défense : « Ah! Ah! c'est de votre faute si je vous ai trompé ». Un tel moyen de défense ne devrait pas pouvoir être invoqué par un escroc. [p. 336]

Voir également *Dalon c. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89 (C.S.C.-B.). Dans leur ouvrage *The Law of Actionable Misrepresentation* (3^e éd. 1974), p. 218, les auteurs Spencer Bower et Turner abondent dans le même sens :

[TRADUCTION] Celui qui a fait un mensonge, même innocent, par lequel il a amené autrui à changer d'avis — a fortiori celui qui a frauduleusement menti à cette fin et avec un résultat semblable —, s'est à jamais privé lui-même du droit de faire valoir devant une cour de justice, tout autant que devant un tribunal de moralité, que la personne induite en erreur a agi sur la foi de son mensonge de la façon dont lui, l'auteur, entendait qu'elle le fasse. Il ne saurait jamais être admis à se plaindre du fait que l'autre personne a cru le mensonge qui lui a été fait dans le but même de lui inspirer cette conviction, ou de plaider, comme excuse, que si la personne induite en erreur n'avait pas été assez stupide pour faire confiance à un fripon de son espèce, il n'y aurait pas eu de préjudice.

Comme les appellants n'ont pas réussi à établir que la diligence raisonnable de la part de la demanderesse constitue un préalable à la rectification, ni à ébranler le bien-fondé des conclusions du juge de

discussed above, their appeal on the rectification issues must be rejected.

G. Damages in Lieu of Rectification

72

The trial judge awarded \$620,100 in compensatory damages representing the loss of profit on a fully built residential development on the 18th fairway. The appellants argue that damages should be limited to the difference between the market value of the land and the option price of \$400,000. They say compensatory damages should not include the “reasonably expected profit” from a 58-lot housing development.

73

The finding of fact is, however, that the parties specifically contemplated (even on O'Connor's evidence) that the optioned land would be put to the use of residential housing. Damages for breach of the contract, as rectified, therefore must include losses flowing from the special circumstances known to the parties at the time they made their contract: *Brown & Root Ltd. v. Chimo Shipping Ltd.*, [1967] S.C.R. 642, at p. 648; *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670; *Burrard Drydock Co. v. Canadian Union Line Ltd.*, [1954] S.C.R. 307; *Corbin v. Thompson* (1907), 39 S.C.R. 575; *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 655. In *New Horizon Investments Ltd. v. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268 (B.C.S.C.), Nemetz C.J.B.C. observed, at pp. 272-73:

[T]he plaintiff's damages should be assessed by reference to the profits which both parties contemplated the plaintiff would make but for the breach. It is not necessary that this contemplation include a precise pre-estimate or calculation of these losses, only a “. . . contemplation of circumstances which embrace the head or type of damage in question”.

première instance à l'égard des préalables traditionnels examinés précédemment, leur pourvoi doit être rejeté relativement aux questions touchant à la rectification.

G. Dommages-intérêts accordés en lieu et place de la rectification

Le juge de première instance a accordé, au titre des dommages-intérêts compensatoires, une somme de 620 100 \$ représentant la perte des profits qu'aurait permis de réaliser la construction complète d'un complexe domiciliaire au 18^e trou. Les appelants prétendent que les dommages-intérêts devraient se limiter à la différence entre la valeur marchande du terrain et le prix de l'option, prix établi à 400 000 \$. Ils font valoir que les dommages-intérêts compensatoires ne devraient pas comprendre [TRADUCTION] « le profit qu'on pouvait raisonnablement s'attendre à tirer » d'un ensemble résidentiel de 58 lots.

La conclusion de fait est toutefois que les parties ont expressément envisagé (même le témoignage d'O'Connor en fait foi) que les terrains visées par l'option seraient affectés à la construction domiciliaire. Les dommages-intérêts accordés pour la rupture du contrat rectifié doivent par conséquent inclure les pertes découlant des circonstances particulières connues des parties au moment où elles ont conclu le contrat : *Brown & Root Ltd. c. Chimo Shipping Ltd.*, [1967] R.C.S. 642, p. 648; *General Securities Ltd. c. Don Ingram Ltd.*, [1940] R.C.S. 670; *Burrard Drydock Co. c. Canadian Union Ligne Ltd.*, [1954] R.C.S. 307; *Corbin c. Thompson* (1907), 39 R.C.S. 575; *Asamera Oil Corp. c. Sea Oil & General Corp.*, [1979] 1 R.C.S. 633, p. 655. Dans *New Horizon Investments Ltd. c. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268 (C.S.C.-B.), le juge en chef Nemetz a dit ceci, aux p. 272-273 :

[TRADUCTION] [L]es dommages-intérêts de la demanderesse doivent être établis en fonction des profits que les deux parties avaient estimé pouvoir être tirés par la demanderesse, n'eût été la rupture du contrat. Il n'est pas nécessaire que ces prévisions comprennent une estimation ou un calcul précis de ces pertes, seulement « [. . .] qu'on tienne compte des circonstances visant le chef ou type de dommage en question ».

The appellants then contend that even if the trial judge selected the correct measure of damages, he ought to have applied a higher discount for contingencies, particularly the contingencies that (1) Sylvan (Bell) lacked the financial resources to exercise the option and fund the project, and (2) the project could not in any event have been completed by the end of 1994, as required. In essence, they argue that in assessing damages, the court must discount the value of the chance of profit by the improbability of its occurrence, and call in aid the observation of Crocket J. in *Kinkel v. Hyman*, [1939] S.C.R. 364, at p. 383:

For my part, I can find no authority . . . justifying any court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value.

It is at this point, I think, that the appellants' argument runs afoul of the rule against raising new fact-based issues on appeal. The trial judge has found as a fact that the respondent contracted for the opportunity to build a residential development on about 10.9 acres of prime land. It was wrongfully deprived of that opportunity. The trial judge set out to assess the value of that lost opportunity (which was, of course, potentially worth considerably less than a certainty). The appellants' trial counsel took little issue with the damages claim as advanced by Sylvan, and did not adduce much of an evidentiary record to the contrary, whether by calling his own witnesses, or through cross-examination of the respondent's witnesses, to challenge significantly the expert evidence of Trouth and others. Trouth may have been overly optimistic and his figures generous, but his evidence was uncontradicted.

Les appelants font ensuite valoir que, même en supposant que le juge de première instance ait choisi la bonne méthode de calcul des dommages-intérêts, celui-ci aurait dû soustraire des sommes plus élevées au titre des éventualités, en particulier les éventualités suivantes : (1) Sylvan (Bell) ne disposait pas des ressources financières requises pour lever l'option et financer le projet; (2) le projet n'aurait pu de toute façon être complété avant la fin de 1994, comme cela était stipulé. Essentiellement, ils prétendent que, dans la détermination des dommages-intérêts, le tribunal doit soustraire de la valeur d'une possibilité de réaliser un bénéfice une somme correspondant à l'improbabilité que cette possibilité se concrétise, et ils invoquent à cette fin l'observation faite par le juge Crocket dans l'arrêt *Kinkel c. Hyman*, [1939] R.C.S. 364, p. 383 :

[TRADUCTION] Quant à moi, je ne puis trouver aucune décision [. . .] justifiant un tribunal d'accorder plus qu'une somme symbolique en dommages-intérêts pour la perte d'une simple occasion de réaliser un bénéfice possible, sauf preuve établissant l'existence d'une probabilité raisonnable que la demanderesse tire de cette occasion un avantage ayant quelque valeur pécuniaire substantielle.

C'est ici, selon moi, que l'argument des appelants va à l'encontre de la règle qui interdit de soulever, en appel, de nouvelles questions basées sur les faits. Le juge de première instance a tiré la conclusion de fait que l'intimée avait contracté en vue d'obtenir la possibilité de construire un complexe domiciliaire sur environ 10,9 acres de terrain de premier ordre. Elle a été injustement privée de cette possibilité. Le juge de première instance a entrepris de déterminer la valeur de cette possibilité perdue (qui, bien sûr, valait considérablement moins qu'une certitude). L'avocat ayant occupé pour les appelants en première instance ne s'est pas vraiment opposé à la demande de dommages-intérêts présentée par Sylvan, et il n'a pas présenté beaucoup d'éléments de preuve tendant à en réfuter le bien-fondé, soit en appelant ses propres témoins soit en contre-interrogeant ceux de l'intimée afin de contester vigoureusement le témoignage d'expert donné par M. Trouth et d'autres témoins. Il est bien possible que M. Trouth ait été excessivement optimiste et ses chiffres généreux, mais son témoignage n'a pas été contredit.

76

The Alberta Court of Appeal characterized the compensatory award as “substantial and generous” (para. 29) but concluded that: “Despite our reservations, we are not prepared to interfere with the award of damages in this case” (para. 27). In the absence of an error of principle, or a factual record that supports the appellants’ criticisms, this Court ought not to interfere with the concurrent findings in the Alberta courts on the amount of compensatory damages.

H. Should the Award of Punitive Damages Be Restored?

77

The respondent in its cross-appeal seeks restoration of the \$200,000 award of punitive damages disallowed by the Alberta Court of Appeal. Principles concerning the award and assessment of punitive damages were canvassed at the hearing of this appeal, heard the same day as *Whiten*, *supra*, reasons in which are released concurrently.

78

It is sufficient to apply the principles developed in *Whiten* without repeating the underlying analysis.

79

Punitive damages are awarded against a defendant in exceptional cases for “malicious, oppressive and high-handed” misconduct that “offends the court’s sense of decency”. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour: *Whiten*, *supra*, at para. 36, and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196.

80

The misconduct found against O’Connor was his contemptuous disregard for Bell’s rights under the verbal agreement of December 1989, together with his subsequent use of the written document (which he knew misstated their verbal agreement) leading up to and including court proceedings filed January 4, 1995, to obtain possession of the golf

La Cour d’appel de l’Alberta a qualifié de [TRADUCTION] « substantiels et généreux » (par. 29) les dommages-intérêts compensatoires accordés en l’espèce, mais elle a conclu ainsi, à cet égard : [TRADUCTION] « [m]algré nos réserves, nous ne sommes pas disposés à modifier les dommages-intérêts en l’espèce » (par. 27). En l’absence d’erreur de principe ou d’éléments factuels qui appuieraient les critiques formulées par les appelants, notre Cour ne devrait pas modifier les conclusions concordantes des tribunaux de l’Alberta sur le montant des dommages-intérêts compensatoires.

H. Y a-t-il lieu de rétablir la décision accordant les dommages-intérêts punitifs?

Dans son pourvoi incident, l’intimée demande le rétablissement de la décision lui accordant des dommages-intérêts punitifs de 200 000 \$ qu’a annulée la Cour d’appel de l’Alberta. Les principes régissant l’opportunité d’accorder de tels dommages-intérêts et la détermination de leur quantum ont été débattus à l’audition du présent pourvoi, qui a été entendu le même jour que l’affaire *Whiten*, précitée, dont les motifs ont été déposés en même temps que les présents motifs.

Il suffit d’appliquer les principes élaborés dans l’arrêt *Whiten*. Il n’est pas nécessaire de refaire l’analyse qui les sous-tend.

Exceptionnellement, des dommages-intérêts punitifs sont accordés lorsqu’une conduite « malveillante, opprimante et abusive [. . .] choque le sens de la dignité de la cour ». Ce critère limite en conséquence de tels dommages-intérêts aux seules conduites répréhensibles représentant un écart marqué par rapport aux normes ordinaires en matière de comportement acceptable : *Whiten*, précité, par. 36, et *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 196.

La conduite répréhensible reprochée à O’Connor fut l’indifférence éhontée qu’il a manifestée à l’égard des droits accordés à Bell par l’entente verbale de décembre 1989, et l’utilisation qu’il a faite ultérieurement de l’écrit (qui, savait-il, ne reflétait pas fidèlement leur entente verbale) jusqu’au dépôt de l’action en justice le 4 janvier 1995, en vue

course property and thereby to destroy the value of Bell's option to develop the agreed-upon residential project.

Torts such as deceit or fraud already incorporate a type of misconduct that to some extent "offends the court's sense of decency" and which "represents a marked departure from ordinary standards of decent behaviour", yet not all fraud cases lead to an award of punitive damages.

O'Connor's fraud was a condition precedent to Bell's successful claim to rectification, for which his company will now receive compensatory damages of \$620,100. Payment of \$620,100 hurts. The question is whether *more* punishment is rationally required by way of retribution, deterrence or denunciation (*Whiten, supra*, at para. 43).

Whiten emphasizes that defendants should have "advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it" (*Whiten, supra*, at para. 86). Here, punitive damages in the sum of \$1,020,100 were expressly sought in the Amended Amended Statement of Claim and the basis for the claim was "disgorgement of the profits the Defendants will enjoy as a result of the [plaintiff's] unilateral mistake". The trial judge, as stated, awarded \$200,000 in punitive damages.

The applicable standard of appellate review for "rationality" was articulated by Cory J. in *Hill, supra*, at para. 197:

Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant

de s'approprier le terrain de golf et ainsi réduire à néant la valeur de l'option accordant à Bell la faculté de construire le complexe domiciliaire convenu.

Les délits comme le dol ou la fraude intègrent déjà un type de conduite répréhensible qui, jusqu'à un certain point, « choque le sens de la dignité de la cour » et « représent[e] un écart marqué par rapport aux normes ordinaires en matière de comportement acceptable ». Pourtant les affaires de fraude ne donnent pas toutes lieu à une condamnation au paiement de dommages-intérêts punitifs.

La fraude d'O'Connor était un préalable au succès de la demande en rectification de Bell, dont la société recevra maintenant la somme de 620 100 \$ en dommages-intérêts compensatoires. Le fait de devoir payer 620 100 \$ est une punition qui fait mal. Il reste à se demander si une punition *additionnelle* est rationnellement requise pour satisfaire aux objectifs de châtimement, de dissuasion ou de dénonciation (*Whiten*, précité, par. 43).

Dans l'arrêt *Whiten*, on souligne que tout défendeur doit « être informé suffisamment à l'avance de ce qu'on lui reproche afin de pouvoir apprécier l'ampleur du risque qu'il court et d'avoir la possibilité de répliquer » (*Whiten*, précité, par. 86). En l'espèce, la déclaration modifiée réclamait expressément des dommages-intérêts punitifs de 1 020 100 \$, dont le fondement était la [TRADUCTION] « remise des profits que les défendeurs tiront par suite de l'erreur unilatérale [de la demanderesse] ». Comme il a été mentionné plus tôt, le juge de première instance a accordé la somme de 200 000 \$ au titre des dommages-intérêts punitifs.

Dans l'arrêt *Hill*, précité, par. 197, le juge Cory a décrit ainsi la norme de contrôle applicable pour l'appréciation de la « rationalité » :

Contrairement aux dommages-intérêts compensatoires, les dommages-intérêts punitifs ne sont pas généralisés. En conséquence, les tribunaux disposent d'une latitude et d'une discrétion beaucoup plus grandes en appel. Le contrôle en appel devrait consister à déterminer si les dommages-intérêts punitifs servent un objectif

81

82

83

84

so outrageous that punitive damages were rationally required to act as deterrence?

85 *Whiten* affirms that “[t]he ‘rationality’ test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum” (para. 101).

86 I agree with the Alberta Court of Appeal that the award of punitive damages in this case does not serve a rational purpose.

87 O’Connor’s fraud was, of course, reprehensible. Indeed, fraud is generally reprehensible, but only in exceptional cases does it attract punitive damages. In this case, the trial judge, at para. 109, thought punishment above and beyond the payment of generous compensatory damages was required for two reasons, namely that O’Connor’s actions (1) “demand an award which will stand as an example to others” and (2) “at the same time assure that O’Connor does not unduly profit from his conduct”. These are both legitimate objectives for the award of punitive damages (*Whiten, supra*, at paras. 43 and 111). However, it must be kept in mind that an award of punitive damages is rational “if, but only if” compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation.

88 This was a commercial relationship between two businessmen. One tried to pull a fast one on the other. There was no abuse of a dominant position. O’Connor’s misconduct was planned and deliberate and he persisted in it over a period of four and a half years, but in the end the courts did their work and Bell obtained full compensation plus costs on a solicitor-client basis, all of which undoubtedly had a punitive effect on O’Connor. In addition, O’Connor is stigmatized with a judicial finding (now upheld by two appellate courts) that he acted in a way that

rationnel. En d’autres termes, la mauvaise conduite du défendeur était-elle si outrageante qu’il était rationnellement nécessaire d’accorder des dommages-intérêts punitifs dans un but de dissuasion?

L’arrêt *Whiten* confirme que « [l]e critère de la “rationalité” s’applique tant pour statuer sur l’opportunité des dommages-intérêts punitifs que sur leur quantum » (par. 101).

Je souscris à la conclusion de la Cour d’appel de l’Alberta selon laquelle la décision d’accorder des dommages-intérêts punitifs en l’espèce ne sert aucun objectif rationnel.

La fraude commise par O’Connor était, bien sûr, répréhensible. D’ailleurs, la fraude est généralement une conduite répréhensible, mais ce n’est que dans des circonstances exceptionnelles qu’elle commande des dommages-intérêts punitifs. En l’espèce, le juge de première instance a estimé qu’une punition additionnelle s’imposait en sus du paiement de dommages-intérêts compensatoires généreux, et ce pour deux raisons, à savoir que les actions d’O’Connor (1) [TRADUCTION] « commandent une condamnation à une somme qui aura valeur d’exemple » et (2) « en même temps fera en sorte qu’O’Connor ne profite pas indûment de sa conduite » (par. 109). Il s’agit là de deux objectifs légitimes d’une condamnation au paiement de dommages-intérêts punitifs (*Whiten*, précité, par. 43 et 111). Il faut toutefois se rappeler qu’une décision accordant des dommages-intérêts punitifs n’est rationnelle que « si, mais seulement si » les dommages-intérêts compensatoires ne permettent pas de donner effet adéquatement aux objectifs de châtiment, de dissuasion et de dénonciation.

En l’espèce, il s’agissait de relations commerciales entre deux hommes d’affaires, dont l’un a tenté de rouler l’autre. Il n’y a pas eu abus de position dominante. La conduite d’O’Connor était préméditée et délibérée, et elle a persisté pendant une période de quatre ans et demi. En fin de compte, les tribunaux ont rempli leur rôle et Bell a été pleinement indemnisé, en plus de se voir adjuger les dépens sur la base procureur-client, décisions qui, globalement, ont sans aucun doute eu un effet punitif sur O’Connor. De plus, ce dernier est stigmatisé

was “fraudulent, dishonest and deceitful”. His conduct has been soundly denounced and he has been required personally to pay a large amount of money in compensation. The respondent is unable to identify any aggravating circumstances that would not be present in almost any case of business fraud except that O’Connor was found to have behaved abominably in the conduct of the litigation. However, as stated, the trial judge excluded this consideration from the award of punitive damages because he identified it as the basis for his award of solicitor-client costs.

The trial judge’s second reason for punitive damages was to ensure that O’Connor “[did] not unduly profit from his conduct” (para. 109). But in fact O’Connor did not profit at all from his misconduct. The source of his development profits was the prior oral contract. Whatever Performance (O’Connor) made after paying \$620,100 compensatory damages to the respondent rightfully belonged to them under the terms of the (rectified) agreement. As discussed earlier, the verbal agreement of December 1989 contemplated that after five years, O’Connor’s company, Performance, would acquire the golf club lands (minus the optioned lands if the option had been exercised) to develop as it wished for its own account. While on the whole O’Connor’s conduct in this matter was found to be reprehensible, his behaviour also had some redeeming qualities. Early on in the project, for example, O’Connor picked up Bell’s share of mortgage interest when Bell was not able to afford to contribute the amount that he had agreed to pay. The conflict between Bell and O’Connor should not be caricatured as a battle between good and evil.

It may be true, as the trial judge found, that O’Connor’s profits on the balance of lands not

d’une décision judiciaire (maintenant confirmée par deux tribunaux d’appel) ayant qualifié ses actions de [TRADUCTION] « frauduleuses, malhonnêtes et dolosives ». Sa conduite a été sévèrement dénoncée et il a été condamné personnellement à verser une indemnité considérable. L’intimée est incapable de mentionner quelque circonstance aggravante qu’on ne retrouve pas dans la plupart des affaires de fraude commerciale, outre le fait qu’il a été jugé qu’O’Connor s’était comporté de façon abominable pendant le déroulement de l’instance. Toutefois, comme il a été indiqué précédemment, le juge de première instance n’a pas tenu compte de cette considération dans sa décision accordant les dommages-intérêts punitifs, puisqu’elle avait servi de fondement à sa décision adjugeant les dépens sur la base procureur-client.

La deuxième raison invoquée par le juge de première instance pour justifier les dommages-intérêts punitifs était de faire en sorte qu’O’Connor « ne profite pas indûment de sa conduite » (par. 109). Mais en fait, O’Connor n’a aucunement profité de sa conduite répréhensible. La source de ses profits liés au projet d’aménagement était le contrat verbal. Tout profit réalisé par les appelants Performance et O’Connor après paiement à l’intimée de la somme de 620 100 \$ au titre des dommages-intérêts compensatoires leur revenait de plein droit en vertu des conditions de la Convention (rectifiée). Comme on l’a vu plus tôt, l’entente verbale de décembre 1989 prévoyait que, au terme d’une période de cinq ans, la société d’O’Connor, Performance, acquerrait les terrains formant le club de golf (moins ceux visés par l’option si celle-ci était levée), qu’elle pourrait alors aménager à son gré pour son propre compte. Bien que, dans l’ensemble, la conduite d’O’Connor en l’espèce ait été jugée répréhensible, son comportement ne fut pas entièrement dénué d’aspects positifs. Au tout début du projet, par exemple, O’Connor a assumé la quote-part de Bell aux intérêts du prêt hypothécaire quand ce dernier a cessé d’être en mesure de contribuer la somme qu’il s’était engagé à payer. Le conflit opposant Bell et O’Connor ne devrait pas être dépeint caricaturalement comme une bataille entre le bien et le mal.

Il se peut, comme a estimé le juge de première instance, que les profits d’O’Connor sur les terrains

subject to the option will “recover all or more of the amount of damage for loss of profit awarded against him in favour of Bell” (para. 109), but, with respect, that is not a rational reason to punish O’Connor further. Those profits are not the fruit of misconduct directed at Bell.

non visés par l’option lui permettent [TRADUCTION] « de recouvrer la totalité des dommages-intérêts qu’il a été condamné à payer à Bell au titre du manque à gagner, ou une somme plus grande encore » (par. 109) mais, en toute déférence, cela ne constitue pas une justification rationnelle pour punir O’Connor davantage. Ces profits ne sont pas le fruit d’une conduite répréhensible visant Bell.

91 Finally, the assessment of \$200,000 coincides with the payment that Sylvan (Bell) was obliged to pay in order to exercise the option, and which the trial judge properly took into account in his assessment of compensatory damages. This figure has no rational relationship to the appellants’ potential development profits on the balance of the golf course land, on which there was no evidence. Moreover, it is a payment that the appellants, under the rectified agreement, were entitled to keep.

Enfin, la somme de 200 000 \$ coïncide avec celle que Sylvan (Bell) était tenue de verser pour lever l’option et dont le juge de première instance a à juste titre tenu compte dans la détermination des dommages-intérêts compensatoires. Ce chiffre n’a aucun lien rationnel avec les profits susceptibles d’être tirés par les appelants de la réalisation d’activités d’aménagement sur le reste des terrains du parcours de golf, profits au sujet desquels aucune preuve n’a été produite. De plus, il s’agissait d’un paiement que les appelants avaient le droit de conserver en vertu de la Convention rectifiée.

92 As pointed out in *Whiten, supra*, at paras. 98 and 100, and *Hill, supra*, at para. 197, punitive damages are not “at large”, and both the award and the assessment of quantum must meet the test of rationality. In this case, with respect, neither the punitive damages award nor the \$200,000 assessment survives that test.

Comme il a été mentionné dans l’arrêt *Whiten*, précité, par. 98 et 100, ainsi que dans l’arrêt *Hill*, précité, par. 197, les dommages-intérêts punitifs ne sont pas des dommages-intérêts « généraux », et l’opportunité d’accorder de tels dommages-intérêts ainsi que la détermination de leur quantum doivent satisfaire au critère de la rationalité. En toute déférence, en l’espèce ni la décision accordant des dommages-intérêts punitifs ni la somme de 200 000 \$ ne satisfont à ce critère.

IV. Conclusion

IV. Conclusion

93 I would therefore dismiss the appeal and cross-appeal both with costs on a party-and-party basis.

Par conséquent, je suis d’avis de rejeter le pourvoi principal et le pourvoi incident, avec dépens sur la base partie-partie dans les deux cas.

The following are the reasons delivered by

Version française des motifs rendus par

94 LEBEL J. — Subject to my comments on punitive damages in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, I agree with Binnie J.’s reasons. I would dispose of the appeal and cross-appeal as he suggests. Rectification of the contract was properly ordered, but punitive

LE JUGE LEBEL — Sous réserve des commentaires que j’ai faits sur la question des dommages-intérêts punitifs dans le pourvoi connexe *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18, je souscris aux motifs du juge Binnie en l’espèce. Je trancherais le pourvoi principal et le pourvoi

damages would fulfill no rational purpose in this case.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants/respondents on cross-appeal: Burnet, Duckworth & Palmer, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Fraser Milner Casgrain, Calgary.

incident de la manière qu'il suggère. C'est à juste titre que la rectification du contrat a été ordonnée, mais des dommages-intérêts punitifs ne serviraient aucune fin rationnelle dans la présente affaire.

Pourvoi principal et pourvoi incident rejetés avec dépens.

Procureurs des appelants/intimés au pourvoi incident : Burnet, Duckworth & Palmer, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident : Fraser Milner Casgrain, Calgary.

TAB 17

Court of King's Bench of Alberta

Citation: La Trace v Warkentin Building Movers, 2025 ABKB 412

Date: 20250707

Docket: 1703 09064, 1703 04023

Registry: Edmonton

Between:

Dean La Trace and Darlene La Trace

Plaintiffs

- and -

Warkentin Building Movers Virden Inc., operating as Warkentin Building Movers

Defendant

Warkentin Building Movers Virden Inc.

Plaintiff

- and -

Dean La Trace and Darlene La Trace

Defendants

**Reasons for Decision
of the
Honourable Justice S.N. Mandziuk**

I. Introduction

[1] Darlene La Trace (**Ms. La Trace**) and Dean La Trace (**Mr. La Trace**) are a married couple (collectively **La Traces**) who have a farm property in the Sherwood Park area of Strathcona County, Alberta (**La Trace Property**).

[2] Warkentin Building Movers Virden Inc. operating as Warkentin Building Movers (**WBM**) is a corporation engaged in the building moving business. WBM's principal is Wayne Warkentin (**Mr. Warkentin**).

[3] In the fall of 2015, the La Traces hired WBM to move a house, gazebo, and garage roof (collectively **Structures**, individually **House**, **Gazebo** and **Garage Roof**) from a rural property in the Nisku-Beaumont area of Leduc County (**Leduc Property**) to the La Trace Property. The La Traces purchased the Structures from a third party for \$5,000.

[4] WBM moved the Structures from the Leduc Property to the La Trace Property in early 2016. The Structures were damaged during the process.

[5] The parties filed Statements of Claim against each other in two separate actions. The two actions were consolidated pursuant to a May 13, 2019 Order of this Court and heard together. The trial proceeded over 20 days, beginning in November 2021 and concluding in September 2022, with final arguments being heard in January 2024.

[6] The La Traces' Amended Statement of Claim, filed July 21, 2020, seeks judgment in the amount of \$1,480,000 for negligence and breach of contract, and "plead[s] and rel[ies] on the *Fair Trading Act*, RSA 2000, c F-2" (as it then was) alleging various "unfair trading practices". This statute is now called the **Consumer Protection Act**, RSA 2000, c 26.3 (**CPA**). The La Traces seek costs of their action as well as interest pursuant to the **Judgment Interest Act**, RSA 2000, c J-1. In written argument, the claim is expanded to include the cost of rebuilding the House (several million dollars) and general and punitive damages (\$1,500,000 for those two heads of damages).

[7] WBM's Amended Statement of Claim, filed January 19, 2018, seeks judgment in the amount of \$42,500 for the balance of the contract price, damages for lost use of equipment in the amount of \$109,800, and payment of a bill owed to CN Rail (\$4,410), a third party engaged during the move. WBM also claims costs and interest at the contractual rate of 24% or interest pursuant to the *Judgment Interest Act*.

[8] WBM admits liability for the House striking a tree during the move and quantifies the damages in accordance with the findings of Robert Clarke, in his expert reports dated February 17, 2016, and October 17, 2021. The particulars of those reports and Mr. Clarke's evidence will be addressed later in these Reasons.

II. Burden and Standard of Proof

[9] This is a civil case. Accordingly, the onus is on a party who wishes to prove a fact to prove that fact on a balance of probabilities.

[10] The Supreme Court of Canada firmly established the standard of proof in civil cases in **FH v McDougall**, 2008 SCC 53 [**FH**], holding (at para 40) that "... in Canada ... there is only one civil standard of proof at common law and that is proof on a balance of probabilities."

[11] This means that “the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred” (*FH* at para 44, emphasis added).

[12] The Court in *FH* goes on to observe that:

...evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

(para 46, emphasis added)

[13] This evidentiary rubric applies to the issues the parties raise in their respective claims.

III. Facts

[14] The evidence will be summarized in roughly chronological order. Where facts are disputed, I will provide my findings of fact within the chronology. Some of the facts that specifically relate to the causes of action will be dealt with at other appropriate places within these Reasons.

[15] The evidence consists of oral testimony from both lay and expert witnesses, expert reports, read-ins from Questioning, and a very large number of exhibits.

[16] The evidence also includes portions of an Affidavit sworn by Helmut Nickel on October 29, 2020 (**Nickel Affidavit**). Helmut Nickel died on December 21, 2020. The La Traces applied to have the Nickel Affidavit entered as an expert report concerning the construction of the House and its pre-move value. I allowed certain paragraphs of the Nickel Affidavit into evidence (see *Warkentin Building Movers Virden Inc v La Trace*, 2022 ABQB 346).

A. The Structures

[17] The House was built in the mid-1990’s by and under the supervision of Helmut Nickel. In the Nickel Affidavit, he describes himself as an experienced “master masonry contractor”.

[18] Mr. Nickel describes the House as “[a] dream home ... of custom design incorporating a massive central fireplace/waterfall feature with soaring ceilings”. He characterizes it as a very high-end home.

[19] The description of the Structures that follows comes from photographs and other pieces of evidence.

[20] The House was a single-story home with a 3-car garage attached. The main structure of the House was hexagonal, with a rundle-stone fireplace central feature and staircase to the basement in the middle. One side of the main structure was the living room while the other side housed a kitchen.

[21] The Solarium appears to have been built on the lower level, equipped with multiple skylights, protruding out of the main structure on the side of the living room. As the Solarium was on the basement level, its ceiling reached halfway up the walls of the House.

[22] All other areas of the House were connected to the main structure with their own sections. The master bedroom was attached to one side of the center hexagon past the kitchen, while the two other bedrooms and the connecting Garage were attached to the central structure on the other side of the kitchen.

[23] The House had bricks on its exterior finish. The Garage was built with cinderblock walls and also had an exterior finish of bricks.

[24] The Gazebo, built in a similar fashion to complement the House, was hexagonal in design, with steel poles as its main support between wall panels and a layer of bricks on the outside. There were windows built into most wall panels, with some walls having two windows. It was a separate Structure; that is, it was not connected to the House.

B. The La Traces Purchase the Structures

[25] On August 24, 2015, Ms. La Trace was driving in the vicinity of the Leduc Property. She saw the House. There was no signage indicating that it was for sale, but she observed that there was development in the vicinity and thought that it might be available for purchase.

[26] Ms. La Trace testified: “I thought I hit the lottery”. Ms. La Trace testified that the House was a “very unique house, custom built” with rundle stone, slate floors, granite in mouldings and shower walls, 2200 square feet in size. The La Traces describe the House in the Amended Statement of Claim as “a unique building of superior craftsmanship and quality”.

[27] After making some inquiries, Ms. La Trace met a “remediation contractor” named Tom Van Tetering.¹ He represented the landowner and told Ms. La Trace that the House was not being lived in. The House had sat vacant since August 2014, more than one year before Ms. La Trace saw it for the first time. Mr. Van Tetering informed Ms. La Trace that the Structures were available for sale as the landowner was trying to reduce costs. Ms. La Trace discussed the matter with Mr. La Trace. Negotiations ensued.

[28] The Nickel Affidavit asserts that the property was in “pristine” condition when it was vacated, but by late 2015 had suffered some damage. Ms. La Trace testified that when she first saw the House it had broken windows, and she answered affirmatively when asked “so a lot of windows in the house were broken”. Vandals had damaged the drywall and microwave. Electricity, water, and heat had not been supplied to the House since it was vacated.

[29] In her testimony, Ms. La Trace stated that at the time she purchased the House it only needed new windows, minor drywall repairs, a new garage, new appliances, stairs to the basement, a foundation for the House and the garage, and all utility hookups including water. A cabinet door needed to be replaced as well as some lights.

¹ Mr. Van Tetering was not called as a witness in the trial. Any statements made by him are hearsay and therefore of minimal, if any, weight.

[30] I find it to be more likely than not that the vacant House was in less than pristine condition when the La Traces purchased it. The La Traces did not have the Structures appraised or inspected during the purchase process.

[31] The La Traces intended to move the Structures to the La Trace Property, and to that end contacted a number of movers before purchasing the Structures. At some point during the purchase process, they contacted Mr. Cornelius, a “contractor that specializes in foundations” who said that the Structures were in moveable condition, but it would be difficult due to the House’s footprint.

[32] On that basis, Ms. La Trace began the process of finding someone to move the Structures. She consulted three different companies and for various reasons did not retain any of them. She testified that one of the movers told her that the House “was structurally sound to move”. Two of the three movers told Ms. La Trace that there would have to be one or more cuts to move the House.

[33] By late August 2015, Mr. Van Tetering informed the La Traces that they could no longer purchase the Structures. However, by mid-September, this position had changed. The negotiated price paid by the La Traces for the Structures was \$5,000. Ms. La Trace testified that she “didn’t really want to pay anything” originally but agreed that “\$5,000 would be a steal” for the Structures. The price was for all of them. The purchase price was not broken down by individual Structure.

C. The La Traces Retain WBM

[34] Mr. Van Tetering referred the La Traces to WBM, a building moving company whose principal, as mentioned earlier, was (and is) Mr. Warkentin. Mr. Warkentin had allegedly told Mr. Van Tetering who told the La Traces that the House could be moved without any cuts. According to the La Traces, Mr. Warkentin met Mr. Van Tetering in early September 2015 at the Leduc Property to assess the move. This was relayed by the La Traces in their testimony; it is of minimal evidentiary value as it is double hearsay.

[35] Ms. La Trace researched WBM on the internet, noted some touting of expertise on WBM’s website, WBM’s membership in the International Association of Structural Movers and the representation that WBM is a third-generation business. Ms. La Trace arranged to meet Mr. Warkentin. They looked at the House and the Gazebo.

[36] There was an undocumented or “handshake” deal between the parties during the last week of September 2015. The La Traces and WBM agreed that WBM would move the Structures from the Leduc Property to the La Trace Property for \$80,000 plus GST and \$15,000 for “line lifts”. In addition to pricing - according to Ms. La Trace - they discussed many aspects of the move, the route that could be taken and Mr. Warkentin “had to give me [Ms. La Trace] insurance and worker’s comp certificate, those were our terms . . . he needed to give it to me [in] writing”.

[37] On October 14, 2015, Mr. Warkentin advised the La Traces that the Solarium attached to the House would have to be removed. The following day, he cut the Solarium from the House.

[38] On October 17, 2015, Mr. Warkentin sent Ms. La Trace an email saying that he would “get a look at the brick work tomorrow and try and see how well it’s attached to see if we can save you some money on prep time and get an agreement to you. Date to start will work after nov 7”. He states that he would like to meet the next day and get a deposit.

[39] Ms. La Trace responded to Mr. Warkentin's email six minutes later indicating that she was getting on a plane, that Mr. La Trace would meet Mr. Warkentin on October 27, 2015, and said that she needed an agreement "ASAP".

[40] Within an hour, Mr. Warkentin sent a document that has the characteristics of an invoice or work order or quote (it lacks a specific title). I will refer to it as the **Quote** in these Reasons.

[41] The Quote is dated October 17, 2015, on WBM letterhead. The La Traces are named as the "Client", and their contact information is detailed. In the "Job Description" section of the Quote it states:

- Moving House Nisku/Beaumont area onto foundation (with pockets)
- Moving roof of garage onto blocking.
- Moving Gazebo and removing brick if needed.
- prep work on brickwork will be attempted but no guarantee on it being secured when moved.
- powerline lifts not included.

[42] Just below the Job Description section is the following:

Moving of fixed structures, police escorts & hydro costs not included. *Not responsible for cracking of drywall, stucco, wiring, or water lines due to moving stress.

[43] The price quoted is consistent with the earlier "handshake" agreement: \$80,000 plus \$4,000 GST for a total of \$84,000.

[44] Mr. La Trace responded with an email on October 18, 2015, stating, "thanks for sending the agreement". He said he could meet Mr. Warkentin on October 27, 2015, and sought confirmation about several matters:

- Whether two rows of bricks on the House will be removed and supported by angle iron.
- The nature of "pockets".
- Confirmation that the Gazebo could be placed on a foundation if it were ready but otherwise on blocks.
- Whether the fireplace would be welded in/secured.
- Clarification of the payment structure.
- Request copies of WCB and insurance coverage.

[45] Mr. Warkentin responded a few hours later, stating that he would give a more detailed answer and would book November 7, 2015, to start work (which he would normally not do before receiving a deposit) and indicated that he would be postponing other work. On October 26, 2015, Mr. Warkentin provided the following clarifications:

- (a) He intended to remove two rows of brick "to accommodate angle/channel iron to support brick work". But he noted: "[t]here is no guarantee that brick work will stay on however we will attempt to move it" [sic].

- (b) He clarified that pockets were to accommodate steel to put the House on the foundation and that the fireplace would be supported by a steel beam grid. The La Traces would be charged for the steel which WBM would supply.
- (c) The Garage Roof would be set on blocking, and the Gazebo would be moved “without brickwork” and put on a foundation or blocking.
- (d) The power line lift, land crossing fees, snow removal (all if necessary) “must be paid as bill comes in”.
- (e) The payment schedule would be \$10,000 up front, \$20,000 when House was loaded, \$30,000 when moved and \$20,000 when placed.²

[46] In response to Mr. Warkentin’s October 26, 2015 email, Ms. La Trace: inquired about the cost of the steel; stated that she did not know they were pulling brick off the Gazebo; asked about using angle iron on the Gazebo; requested WCB and insurance confirmation; and said that the La Traces’ insurance provider had wanted them to get that information before providing the deposit. She also said that “[t]he rest looks fair and reasonable and as discussed”.

[47] Mr. Warkentin emailed less than an hour later stating that he thought the brick was coming off of the Gazebo, doubting that it would stay in place and did not think it was worth saving.

[48] There is a further document dated October 26, 2015, that confirms payment of the \$10,000 deposit. Although it is remarkably similar if not identical to the Quote, it has the job description shortened to simply refer to the move and it says, “pd. deposit” and refers to the \$10,000. This document can only reasonably be interpreted as a receipt for payment of the initial deposit.

D. The Move is Planned and the Structures are Prepared

[49] The parties began planning the move in October 2015. Ms. La Trace was out of the country for most of the period between the third week of October 2015 and February 2016, so Mr. La Trace took the lead role.

[50] On October 27, 2015, Mr. Warkentin met with Mr. La Trace and examined the Gazebo.

[51] The initial start date was set for November 7, 2015. The La Traces had removed the House’s windows and the Garage door by this point. Between November 7 and 9, 2015, the La Traces reported to the police that the House had been further vandalized.

[52] On November 13, 2015, Mr. Warkentin emailed the La Traces asking if the Gazebo foundation was ready at the La Trace Property. Mr. La Trace replied that it had been poured the week before.

² During her testimony on November 4, 2021, Ms. La Trace responded “Yes” to the following question: “Okay. And he outlines the payment schedule, \$10,000 deposit, \$20,000 when the house is loaded, 30,000 when the house is moved, and 20,000 when the house is set down, right?”.

[53] Ms. La Trace testified that she was responsible for preparing the Gazebo for the move by placing angle iron. In fact, she did not put angle iron on the Gazebo. Ms. La Trace explained this by saying that she was under the impression that the House was being prepared for the move.

[54] In conducting preparatory work, Mr. Warkentin discovered that the OSB on the base of the Gazebo was attached to the sill plate on the other side of the OSB on poles and then placed on the concrete foundation.

[55] Some pages from Mr. Warkentin's personal diary or calendar were entered into evidence. They are difficult to read and understand, so not all entries that are pertinent to this case are necessarily mentioned in these Reasons. However, the November 21 and 22, 2015 entries say, "started at La Trace rocks not moved . . . set gazebo La Trace" and Mr. Warkentin's calendar for the week of November 23-29, 2015, refers to the bricks being taken off of the Gazebo on November 26. Work was done on the Solarium during this time period.

[56] Mr. Warkentin testified that on or around November 27, 2015, while his team was loading the Garage Roof, they lifted the Bobcat bucket too high, and a part of the rafters broke. This incident was not reported to the La Traces.

[57] The plan was to move the Garage Roof and Ms. La Trace agreed that it could be cut off, but the walls could not be moved. Ms. La Trace said they would build the walls when they moved the Garage Roof. The Garage Roof was removed on November 27, 2015.

[58] Mr. Warkentin showed Mr. La Trace the brickwork on the Gazebo and said that it could not stay on and needed to be removed. Mr. La Trace agreed, and on November 28, Mr. Warkentin removed the bricks from the Gazebo. This was confirmed the same day in a text conversation between Mr. Warkentin and Mr. La Trace. Mr. Warkentin advised that the bricks were off the Gazebo and the Garage Roof had been prepared for the move.

[59] While attempting to brace the brick on the House Mr. Warkentin discovered that the

... builder put insulation (styraphome) [sic] round outside the put brick on. The nail for the brick ties go they the Styrofoam then in wall... May be holding ½ inch or less onto wall . . . not much holding the brick work on [sic].

[60] On November 29, 2015, he confirmed his discovery in an email to the La Traces stating "[y]ou did not know that and neither did I". His intention was to brace the base of the brick, but he would have to use 2/6 and screws instead of angle iron "because there isn't enough 'structure' to bolt too" [sic]. In other words, Mr. Warkentin was of the view that he had to use 2 by 6 lumber and screws in place of angle iron because there was not enough structure to bolt on to. He said it would be more secure and that he was "confident this brick will stay intact for the move".

[61] On November 30, 2015, Mr. La Trace responded and said that "the original plan remains as agreed the brick comes". Mr. Warkentin emailed back shortly after and said, "we are still doing the original plan as far as the bracing".

[62] On December 3, 2015, Mr. La Trace sent an email to Mr. Warkentin asking about the timing of the move, noting that "it looks like lifting is coming along well". On the same day, the Garage was cut off of the House.

[63] Mr. La Trace was going to be away and asked about the December 26 to January 6 timeframe to move the Gazebo and the House. Mr. Warkentin said he was “sure” they could work around those dates.

[64] Mr. La Trace requested an update by email on December 29, 2015. Mr. Warkentin replied that the move was planned for January 14-15, 2016. There were some further emails exchanged about power and gas hookups.

[65] Mr. Warkentin’s calendar entry for December 30, 2015, states “equipment to La Trace”. At this point, work equipment owned by WBM required for the move was on the Leduc Property. The January 12, 2016 calendar entry refers to “working on cross beams under fireplace” but it is not directly clear that this relates to the La Traces.

[66] On January 6, 2016, Mr. Warkentin advised Ms. La Trace that due to the width of the House, the “hwys dpt.” would not allow the move and the House had to be cut, which he would do at his expense and then move the House separately. Mr. Warkentin asked for consent to cut the House, separating the master bedroom from the rest of the House. A flurry of emails follows. Ms. La Trace questioned why the move was quoted as it was, to move in one piece, when it is WBM’s “job to know how wide a house u can move” [sic]. She said that Mr. La Trace wanted to meet him.

[67] Also on January 6, 2016, Mr. Warkentin emailed the La Traces and stated that while he had moved wider homes during his career, the route taken is a factor and he cannot control how the authorities issue their approvals: “[e]ach move is treated different”. He advised that while he could make the cut - and indicated where the cut should be made - and place the two pieces on the foundation, he could not connect the two pieces together.

[68] Further discussions concerning the logistics and costs of the move ensued.

[69] On January 11, 2016, Mr. Warkentin told the La Traces that the quote from Fortis for line lifts was \$30,000. He was still waiting for other third-party quotes that would be required for the move, for example, Battle River, Shaw, Telus, Carillion, and CP Rail.

[70] On the same day, Mr. La Trace responded that the Fortis quote was surprisingly high and that it was possible that the move might be cancelled due to economic considerations. The quote from Fortis was “[w]ay higher than our last move. Perhaps we’d best wait until we get some of the other prices nailed down before we proceed. If the remaining ones come in at similar values, the house isn’t worth moving”.

[71] On January 12, 2016, Mr. Warkentin sent Mr. La Trace an email saying he had resubmitted applications for high load permits and suggested that lowering the top of the fireplace could make a difference. Work was continuing to prepare the House for the move. Mr. La Trace responded “[t]hanks for the update. Let me know when you get pricing back”.

[72] On January 11, 2016, Mr. La Trace had several email exchanges with Mr. Warkentin asking to “nail down” the other prices before proceeding. Mr. La Trace asked if some of the prices can be lowered for the move. Mr. Warkentin emailed the La Traces and said that he would not be responsible for reconnecting the two portions of the House. Mr. Warkentin also said he wanted to cut the House that day and requested confirmation from the La Traces of their mutual

understanding that WBM would not reconnect the pieces of the House but would place them together on the foundation.

[73] Mr. Warkentin emailed on January 11, 2016, that he was waiting for information about the railway crossing cost and thought it would be “worst case 3500”. Carillion was expected to cost about \$2,000 and Battle River \$500. Mr. Warkentin indicated that this would be the extent of third-party costs. That evening, Mr. La Trace again emailed asking about a different route and whether the costs could be lowered. Mr. Warkentin replied that there were problems with the alternative route suggested by the La Traces. He forwarded information that he had received from third parties to that point.

[74] The master bedroom cut was made on January 11, 2016, and the House and Garage were tarped. Mr. La Trace emailed Mr. Warkentin with consent to this step on January 13, 2016, authorizing the “removal of the bedroom as required”. The work may have been done already. Mr. Warkentin testified that he had Mr. La Trace’s verbal agreement on January 11, 2016. Nothing turns on this; the fact is that the La Traces agreed to the master bedroom cut.

[75] On January 12, 2016, there were discussions about changing the route, which centered around Alberta Transportation and Fortis, according to WBM. Ms. La Trace admitted that she knew nothing about the discussions with third party authorities. When faced with additional costs for railway crossings Ms. La Trace asked Mr. Warkentin if another route could be followed but it was not possible.

[76] On January 16, 2016, Mr. Warkentin confirmed that the steel bracing to support the fireplace was in place. Four days later he confirmed a move date of January 26, 2016.

[77] There were some trees along the route, near the La Trace Property, that had to be trimmed away from the road. On January 20, 2016, Davey Tree (a third party engaged by WBM) arranged with WBM to facilitate the move.

[78] By January 21, Mr. Warkentin had advised the La Traces that trees had been removed along the route by Davey Tree. Mr. Warkentin requested a meeting and further payment and deposit.

[79] Mr. La Trace also advised Mr. Warkentin that he would not be available for the move on January 22, 2016, as he was going to be out of the country.

[80] A handwritten note dated January 22, 2016, prepared by Mr. Warkentin, is in evidence. It is difficult to follow but appears to document WBM’s dealings with third parties - Eastlink, Shaw, Telus, Fortis, Battle River, HWS, Carillion, CN Rail, Leduc County, Rig Mats, RCMP, Strathcona County, as well as Battle River and Davey Tree - showing various phone numbers, contact names, cost estimates, and related information. The January 22 note has building measurements and route maps written on it and there is an entry saying, “Debbie says no”.

[81] On January 23, 2016, Mr. La Trace drove the route and saw tree debris on the road. He said it was a “mess” and the neighbours were “upset”. Mr. Warkentin said he had arranged tree removal with the County authority in advance, and the County had suggested using Davey Tree. The cost estimate was \$4,000 and this work was necessary to facilitate travel along the route without having the load hit trees.

[82] A further document in the same format as the Quote is in evidence, dated January 24, 2016 (**Quote 2**). Mr. La Trace signed this document. It confirms: (a) Payment of a second deposit of \$20,000; and (b) “[c]ustomer agrees to pay all Bills as agreed on as bills come in – utility, structures, trees”.

E. The Move Takes Place

[83] Notwithstanding the La Traces’ complaints after the fact about third party costs, the way that the Structures were prepared for the move, the route taken, and other matters, the La Traces did not delay or stop the move from taking place. They could have done so at several junctures. By this point, they fully intended to have WBM continue its work to completion.

[84] The move date for the House was set for January 26, 2016. This appears to be confirmed by Mr. Warkentin’s calendar entry for that date: “moved big house”.

[85] DBI – a third party contractor - was hired by WBM to haul the master bedroom during the move.

[86] The move of the House and master bedroom began early on January 26, 2016. The weather was “clear” and “dry”. The convoy consisted of the Fortis vehicle, two pilot cars, an RCMP car, the House, DBI with the master bedroom, at least one more pilot car, and Mr. La Trace bringing up the rear.

[87] The convoy began driving south on a range road for three quarters of a mile before arriving at a Fortis lift. After clearing the Fortis lift the convoy continued to go south before turning onto Range Road 625 going east. On Range Road 625 the convoy stopped to check the status of the House and master bedroom before continuing to turn north onto Highway 21.

[88] On Highway 21, the convoy crossed the anticipated CN Rail crossing around noon and stopped at a service station. The original plan was to park the House and master bedroom overnight on a service road just before Highway 14; however, the convoy continued on after a short rest.

[89] The convoy proceeded onto Highway 14 heading west until it finally reached Range Road 233 heading south at around 4:00 p.m. to 4:30 p.m. Around this time it began raining, but the roads were not yet icy. As the move progressed through the evening, weather conditions continued to “worsen”. The roads were “icing up” and it had begun to “sleet”.

[90] During the move WBM determined that House rafters had to be cut. Mr. La Trace signed a document dated January 26, 2016, which states:

Dean La Trace has agreed to have rafters cut by Warkentin building movers to move home on rr 233.

At no cost to Warkentin building Movers agreement on price to move house.

[91] After the rafters were cut, the road conditions had become icy, and the convoy had to slow down.

[92] During the drive to the La Trace Property, the House hit a tree on the passenger side. The convoy continued despite the tree strike and arrived at the La Trace Property.

[93] The House and master bedroom were placed on blocking at the La Trace Property. The House was still hooked up to hydraulic lines and the truck was not removed. The master bedroom was removed from the DBI trailer and placed southwest of the House.

[94] WBM, at some point after the move, placed an additional support brace on the porch of the House.

[95] On January 27, 2016, Mr. Warkentin applied for the Gazebo moving permit.

[96] A third quote-like document dated January 28, 2016, was provided by WBM to the La Traces (**Quote 3**) and states that the third deposit referred to in the Quote was due in the sum of \$30,000 plus GST of \$1,500 and with GST owing from the first deposit in the amount of \$500. The Carillion bill is referenced in the sum of \$667.80 and the CN Rail bill at \$4,410. The total amount owing under Quote 3 is \$37,077.80.

[97] On January 28, 2016, Mr. Warkentin determined that the Gazebo had to be moved on beams and dollies instead of a trailer in order to minimize potential damage.

[98] On the evening of January 29, 2016, the Gazebo was moved. This appears to be corroborated by Mr. Warkentin's calendar entry: "[l]oaded gazebo moved at night". This was done overnight, and the Garage Roof was moved as well.

[99] The route taken to move the Gazebo and the Garage Roof was different than the route taken to move the House and master bedroom. This move was completed by January 30, 2016, early in the morning.

F. Placement of the Structures

[100] The master bedroom and the balance of the House had, of course, been separated from each other. Thus, they were placed separately.

[101] The Gazebo was placed north of the House on the La Trace Property. The Garage Roof was placed on WBM's beams and blocking, in the northwest part of the La Trace Property yard, close to where the foundation would be built. The Garage Roof had a broken rafter, which occurred when it was cut from the garage, and was tarped.

[102] The evidence at trial was that WBM tarped the master bedroom, the House, and parts of the Garage Roof. The House was tarped in the section where the master bedroom was removed.

[103] On January 30, 2016, the La Traces refused to pay WBM after the Structures were placed on the La Trace Property. A cheque for CN Rail was given to Mr. Warkentin.

[104] The February 1, 2016, entry in Mr. Warkentin's calendar says, "got wheels from La Trace Trucks home".

[105] On March 30, 2016, the La Traces told Mr. Warkentin to stay off of their property.

[106] On March 31, 2016, the police were contacted by the La Traces and allegedly said that they would respond if Mr. Warkentin tried to "steal the gazebo". There is no evidence that the police actually became involved.

[107] Mr. Warkentin's April 11, 2016 calendar entry states "got beams La Trace from roof fixed stuff". The La Traces allowed Mr. Warkentin to do this work.

G. Aftermath

[108] The parties reached an impasse. WBM wanted to get paid; the La Traces began dealing with WBM's insurer and preparing, it seems, to litigate.

[109] A number of pieces of WBM equipment remained at the La Trace Property until the House and master bedroom were placed onto the foundation and the Gazebo was placed onto its pad. Mr. Warkentin testified this included two hydraulic turn dollies with 100-ton jacks, one turn dolly, a crab steer dolly, one 84-foot beam, a 16-foot speciality bunk with rollers and a cable, seven main crossbeams (approximately 40-44 foot), six I-beams, approximately 50 blocks, and some cages.

[110] On July 4, 2016, there was some communication between Ms. La Trace and Mr. Warkentin about WBM finishing placing the buildings or else the La Traces would find another contractor.

[111] On November 26, 2016, the House and master bedroom were placed onto foundations and the Gazebo was placed onto the pad. This process took approximately nine days. The La Traces paid WBM \$10,000 for the placement of the House and master bedroom.

[112] The House was placed onto the foundation first, then all of the equipment was pulled out of the House. The master bedroom, placed onto dollies, was driven up to the House for placement. The master bedroom was pushed "[w]ithin inches" of the House and WBM used the skid steer to push the master bedroom the last few inches. The skid steer pushed on the crossbeams underneath the fireplace of the House, which extruded out of the master bedroom. This resulted in the bricks on the chimney seeming to "fall apart".

[113] While the litigation process moved forward, there is evidence of very little being done to secure and protect the Structures.

[114] The La Traces, in attempts to mitigate damage, put up "tarps, OSB, shingles" from the time that the Structures were moved to their land up until the time of trial (at least), and had insured the home for three years before the insurance company apparently cancelled the policy. The La Traces built garage walls in anticipation of moving the Garage Roof onto the new garage however, the Garage Roof was never moved onto the walls. There is some evidentiary empty space regarding these steps.

[115] Quote 3 went unpaid. WBM reissued Quote 3 as a bill dated February 28, 2016, showing \$30,000 owing plus \$600 for the 2% overdue charge, plus GST for a total of \$32,100.

[116] Further invoices or bills were issued on December 4, 2016. Bills were issued dated January 4, 2017, and January 25 (no year specified). These bills include interest charges and a rental charge for items left on the site by WBM.

[117] The La Traces continued to email WBM and its insurer Aviva, requesting help with mitigation. The La Traces reached out to MR Engineering for a valuation and Stantec to determine the structural damage to the home. WBM did not provide any other services to the La Traces and deferred back to its insurer, Aviva.

[118] As of 2022, during the trial, the foundation that was poured prior to the move has endured multiple seasons. Ms. La Trace deposed in a November 8, 2022 Affidavit that the County authorities will no longer issue a building permit to the La Traces. There are no engineers who

will certify the foundation and, according to Ms. La Trace, no builder who will work on it because, at least in part, they cannot guarantee their work. There are safety concerns.

IV. Breach of Contract

[119] In order to determine whether the evidence establishes a breach of contract by either or both parties, contractual terms must be established.

[120] I will begin by outlining the law and then turn to the evidence of contractual terms and breach.

The Law

[121] A contract requires parties to reach agreement on all essential terms – *consensus ad idem* - which the Alberta Court of Appeal discussed in **Ron Ghitter Property Consultants Ltd v Beaver Lumber Co**, 2003 ABCA 221 [**Ghitter**]:

8 Regardless of the theories underlying the enforcement of contracts, mutuality of agreement lies at the root of any legally enforceable contract. The required degree of mutuality of agreement mandates that the parties reach a *consensus ad idem* on essential terms. **In determining whether the parties have reached agreement for legal purposes, the starting point must be the alleged contract itself ... If the wording of the contract is plain and unambiguous, that will ordinarily be an end of the matter. The accepted test is whether a reasonable observer would infer from the words or conduct of the parties that a contract had been concluded...** That is, on an objective basis, have the parties reached *consensus ad idem*?

9 The common thread running through the cases is that the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, **where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty...** This requires the court to decide whether "a sensible third party would take the agreement to mean what A understood it to mean or what B understood it to mean, or whether indeed any meaning can be attributed to it at all"... Otherwise, then, as stated by Lord Maugham in *Scammell, supra* at 255, "the *consensus ad idem* would be a matter of mere conjecture."

(emphasis added; citations omitted)

[122] The terms of the contract must be of sufficient certainty: **Schluessel v Margiotta**, 2018 ABQB 615 [**Schluessel**] at para 6 (per Burns J).

[123] In **Henry Kendall & Sons v William Lillico & Sons Ltd**, [1969] 2 AC 31, 113 Lord Pearce said: "[t]he court's task is to decide what each party to an alleged contract would reasonably conclude from the utterances, writings or conduct of the other". This case was cited by Wakeling JA in **McLennan Ross LLP v Wasylynuk**, 2019 ABCA 129 at para 14, footnote 7. Justice Wakeling also observed, at para 14:

Professor Waddams expressed the generally accepted principle that contract formation is assessed objectively:

The principal function of the law of contracts is to protect reasonable expectations engendered by promises. It follows that the law is not so much concerned to carry out the will of the promisor as to protect the expectation of the promisee. ... [T]he test of whether a promise is made, or of whether assent is manifested to a bargain, does not and should not depend on an enquiry into the actual state of mind of the promisor, but on how the promisor's conduct would strike a reasonable person in the position of the promisee (S Waddams, *The Law of Contracts* (7th ed. 2017)).

[124] A written contract is tangible evidence for the Court of contractual intention (formation, terms, and so forth) but the absence of a written contract is not fatal: ***Hailink Dent Removal Inc v Kindersley Mainline Motor Products Ltd***, 2018 SKQB 138 at para 23. Contracts can also be oral or inferred from conduct; however, a thorough written contract has substantial value from an evidentiary perspective.

[125] Contractual interpretation also involves analysis of the surrounding circumstances, or the factual matrix, to determine the entirety of the contractual arrangement: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53, ***Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp***, 2020 SCC 29, ***ID Inc v Toronto Wholesale Produce Association***, 2025 ONCA 22.

[126] In ***Schluessel*** at para 11, Burns J outlined some of the principles that apply when considering oral contracts:

Credibility: Witness credibility must be tested against those facts that are not seriously in dispute, and with the preponderance of the evidence and the probabilities surrounding the events.

Burden of Proof: The person seeking to enforce a disputed oral contract carries both the legal and evidentiary burden of proving, on a balance of probabilities, that the alleged oral contract was made.

Basic Contractual Principles Apply: There must be proof of offer, acceptance, and certainty of terms.

Consensus ad idem: Parties must agree on essential terms, and these terms must be capable of being determined with a reasonable degree of certainty.

Legal Test to Find Agreement: The Court must assess whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. This is *not* about a party's subjective intention or belief; it is an objective test.

[127] In summary, to determine whether there is a contract and what the terms of that contract are, the starting point is the alleged contract itself. As the Court of Appeal notes in ***Ghitter***, this generally means looking at the wording of the contract, although the conduct of the parties may also assist in determining whether a contract has been created. It must be clear to an objective

bystander, in light of all the material facts, that the parties intended to create a contract, and the terms can be determined with reasonable certainty.

The Terms of the Contract

[128] Ms. La Trace, in her testimony, insisted that a contract was never provided. This is a misunderstanding of the law of contract, which does not confine contract terms to a single element of the parties' dealings with one another.

[129] In the case at bar there is no single contractual document; however, it is clear on the evidence that the La Traces and WBM reached a legally enforceable agreement, that is, a contract.

[130] The contract between the parties here is written, oral, and inferred from conduct. The terms are derived from the Quote and its successors. These documents were proffered by WBM and the La Traces authorized WBM's work based on those documents. It was understood that they represented an agreement, or at least part of the agreement, between the parties. In fact, Mr. La Trace characterized the Quote as an "agreement" in an email dated October 17, 2015.

[131] The Quote and its successors are not the only evidence of contractual terms. Terms are also derived from text messages and emails exchanged between the parties. These communications clarify the work and the parties' understanding of the commercial arrangement.

[132] The emails, conversations, text messages, and documents do not supersede each other unless it is clear from language and context that one form of communication dominates over another from an interpretive perspective. Together, all these modes of communication form part of the contractual matrix and define the terms of the arrangement between the parties.

[133] Based on the foregoing, and applying the civil standard of proof, I find that the contractual arrangement between WBM and the La Traces contained the following terms:

- (a) WBM would move the Structures from the Leduc Property to the La Trace Property where they would be placed. It is a necessary and logical implication that the Structures would be moved undamaged.
- (b) The House would be cut. The master bedroom would be moved separately. The Garage Roof was going to be moved as a separate item.
- (c) The Gazebo required cutting in order to move it.
- (d) The La Traces would pay WBM \$80,000 plus GST, plus third-party costs for application and permitting costs, as well as the third-party work (except for subcontractor costs). WBM would pay them in the first instance.
- (e) Trees would be removed along the route to facilitate the move.
- (f) The payment schedule was agreed to be a \$10,000 up-front deposit, \$20,000 when the House was loaded, \$30,000 when the House was moved, and \$20,000 when the House was set down, plus any applicable GST.
- (g) WBM would provide proof of insurance and WCB coverage.
- (h) There was no guarantee that the brick work would remain intact. The brick on the Gazebo needed to be supported during the move. Ms. La Trace agreed that putting

angle iron on the Gazebo was her responsibility. She did not investigate how the brickwork was attached to the Gazebo and never tried to pull any brick off. There is no evidence of the difference between angle iron and wood bracing. Thus, the bracing done by WBM met the contractual term requiring support for the Gazebo.

- (i) WBM would not be responsible for cracked drywall, stucco, wiring, or water lines due to moving stress.

Matters that are not Terms of the Contract

[134] The following do not constitute terms of the Contract due to a failure of minds to meet, a lack of certainty, or some other reason. These include:

- (a) The use of angle iron to brace the House was not a term of the contract. It was drawn to the La Traces' attention in November that the structural elements of the House would not support angle iron. There was no *consensus ad idem* on this point.
- (b) A specific time frame for the move was never agreed to. The timing of the move was always dependent on WBM's progress with preparing the Structures for the move, weather, and on third party permitting and approvals and other arrangements. The La Traces were aware of this, and while Mr. Warkentin may have been slow in performance, and a sub-optimal communicator, and the La Traces did not like the delays, they acquiesced. As late as January 2016 Mr. La Trace was considering cancelling the move due to escalating third party costs. Thus, specific timing was not a term of the contract.
- (c) Further on timing, specific start and completion dates were not established with any reasonable degree of certainty. Mr. Warkentin would do the move right away, changing his schedule to accommodate it: "he agreed to move his jobs, he was putting me to the front of the line" but "he kept pushing for money without even getting me the agreement". The expectation was that the move would start November 7. The La Traces asked the Court to draw an adverse inference against WBM because Mr. Warkentin did not produce full diaries of all his activities to show that he took on other work, travelled, and did other things between October and when the move started. I decline to do so, since there was no date agreed on in the contract. This was left fluid and was the subject of emails but never really finalized. WBM was working with third parties, had other commitments, and while at times Mr. Warkentin was loose with his promises, dates were not secured, therefore the diaries are not relevant.
- (d) The House being moved in one piece. Although Mr. Warkentin may have thought initially that cutting would not be necessary, two of the three movers contacted by the La Traces before they engaged WBM said that cutting would be necessary. This was within the La Traces' reasonable contemplation. Mr. Warkentin could not obtain a permit to move the House in one piece given its girth. He advised the La Traces of this problem, and they had no involvement in any discussion with the highway authorities. I accept Mr. Warkentin's evidence (the best evidence before the Court on this issue) that he could not have found out earlier about size limitations as these move permits are granted only a few weeks prior to a move.

- (e) The specific route to be taken. A sketch prepared by Mr. Warkentin, which is in evidence, is more likely than not a “thought experiment”. It was drawn prior to the contract being entered into. I find this because of the document itself, which is casually done, has Ms. La Trace’s phone number on it and the number “80ish” which matches the quote. The route that it purports to represent is clearly discretionary and subject to change, based on weather, road conditions, time of year, permitting, authorities, traffic, and many other factors. Furthermore, the route was ultimately determined in consultation with government officials. This determination, as between the La Traces and WBM, fell into the latter’s sphere of responsibility.
- (f) Any fixing of third party costs in advance. The initial representation was that the contract price would be \$80,000 plus \$15,000 for line lifts. The fact that fees to be charged by CN Rail were initially unexpected because of railway crossings was an inevitable result of the route changing, which was driven by governmental authority. Thus, it was not agreed that third party fees outside of WBM’s control were fixed and unchangeable.
- (g) A restriction on hiring DBI or any other third party. There was no prohibition on third party contracting and no requirement for WCB and insurance of another party. There was no contract between DBI and the La Traces.
- (h) Tarping the House, or otherwise sealing it, after the move.
- (i) Ms. La Trace argues that glass blocking was part of the contract, WBM disagrees. Ms. La Trace’s testimony on this point is disjointed. She insisted she did not get the glass blocking but then later admitted WBM brought the glass blocks. WBM does not recall bringing the glass blockings. This is not sufficiently certain to form a contractual term.
- (j) Finishing the Structures and sealing them were not terms of the contract. There is insufficient evidence to conclude, on a balance of probabilities, that there was *consensus ad idem* on this point.

[135] The La Traces argue that the evidence establishes additional, or substitute terms based on representations made by Mr. Warkentin, none of which form part of the contract.

- (a) This was Mr. Warkentin’s job, his whole life, that he would have no trouble with the House, that he had moved even bigger brick houses than this one and “he really talked up his abilities as an expert”. However the La Traces took this, it was not a contractual term that was capable of being breached any more than it could be fulfilled. I have no evidence that this was untrue.
- (b) He would save the fireplace rundle stone and glass blocks, with this “central feature” to be moved “using a grid of steel under it, and it would be welded”. There is an email in which Mr. La Trace inquires about welding, but WBM never confirmed that this would occur. During his testimony on September 16, 2022, Mr. Warkentin stated that he never agreed to that term for the fireplace. The Gazebo was the only structure to have undergone welding in relation to bracing.

- (c) The timing of the Gazebo and House foundations. The La Traces were to prepare the Gazebo foundation, which they did, knowing that the House foundation would have to wait until spring and the House would have to sit on beams in the yard once it was moved. It is unclear what the La Traces' specific grievance is on this point.

Breach of Contract?

[136] Importantly, the analysis of what constitutes the terms of the contract inevitably leads to the exclusion of particular terms that one or the other party advances as constituting contractual terms.

[137] The fact that conditions changed and facts were discovered that changed the way work could be accomplished does not amount to a breach of contract. Changes in route and the inability to move the House in one piece came up as the matter proceeded and were brought to the La Traces' attention. While the problems may have needed quick action to resolve, they were resolved, and the results are reflected in this Decision.

[138] WBM moved the Gazebo, the Garage Roof, and the House. It was implied that they would not be damaged. They were damaged. The fact that they were damaged during the move is a breach of contract.

V. Negligence

[139] The La Traces also sue WBM for the tort of negligence.

[140] Specifically, the La Traces allege in their pleadings that WBM was negligent by:

- (a) Failing to prepare and secure the Structures for moving and to prevent damage;
- (b) Failing to establish a proper transport route;
- (c) Failing to inspect the Structures;
- (d) Failing to adhere to or obtain permits for transportation;
- (e) More specifically, failing to support the Fireplace Feature with a steel beam grid and failing to use angle iron to secure the exterior brick;
- (f) "Punching holes and inserting beams into the Gazebo";
- (g) Failing to place the Structures on foundations in a timely manner;
- (h) Failing to seal the structures or otherwise protect them from the elements;
- (i) Transporting the Structures in breach of the Agreement and legal requirements, and general failure "to comply with applicable legislative and regulatory requirements".

[141] WBM concedes that its negligence during transportation caused the House to strike the tree. It denies all other allegations.

The Law

[142] To establish negligence, a plaintiff must show each of the following:

- Some kind of relationship between the plaintiff and defendant whereby the defendant owed the plaintiff a duty of care.
- The defendant breached the standard of care owed.
- The plaintiff suffered an injury or loss.
- “But for” the defendant’s breach of the duty of care, the injury or loss would not have occurred. The defendant’s breach was *necessary* to cause the loss.

(*Clements (Litigation Guardian of) v Clements*, 2012 SCC 32 at paras 6-8)

[143] I will address each of these required elements of the tort in turn, but the issues in this case revolve around the nature of the loss caused by the Defendant and how that loss is to be quantified monetarily.

Application to this Case

Duty of Care

[144] A claim in negligence begins with a determination of whether one party owed the other party a duty of care. A duty of care is owed by an individual to others who are within the foreseeable risk being affected by their conduct. The duty of care was expanded in *Donoghue v. Stevenson*, [1932] UKHL 100, to recognize the neighbour principle. The neighbour principle requires an individual to take reasonable care when they engage in conduct that they can reasonably foresee as likely to injure their neighbour.

[145] Concurrent actions in tort and contract require the Plaintiff to establish there was a special relationship that existed to give rise to a common law duty of care which is independent of the contract. A duty of care requires both sufficient proximity between the parties and an absence of policy reasons preventing recognition of that duty. There are recognized categories where a duty of care has been pre-established between parties.

[146] Courts have observed that a “relational economic loss may give rise to a tort duty of care in certain situations, as where the claimant has a possessory...interest in the property”: *Cooper v Hobart*, 2001 SCC 79 at para 36. It is evident that the La Traces and WBM have such a relationship. WBM was hired to move Structures which the La Traces owned.

[147] I have no difficulty concluding that WBM owed the La Traces a duty of care.

Standard of Care

[148] The question of breach of the duty of care necessitates consideration of the standard of care.

[149] There is no expert evidence before the Court of the standard of care for a mover in these circumstances. Perceptions and feelings about what was done or not done are not sufficient to establish a standard of care, so, the general standard would apply. The general standard of care is described in *Gaudreau v Belter*, 2001 ABQB 101 at para 3: “the general trend in the more recent cases has been to require a bailee to exercise the care that is *reasonable in all the circumstances*”. More recently, the Court in *Tarpon Energy Services Ltd v Lal* noted: “[t]he obligation of a bailee... is to take the same care of the goods received as a prudent owner, acting

reasonably, might be expected to take of his or her own chattels”: 2020 ABQB 317 at para 42, citing *Letourneau v Otto Mobiles Edmonton (1984) Ltd*, 2002 ABQB 609 at para 46.

[150] I do not have evidence of the standard of care in this case beyond the duty to take reasonable care. Thus, it is impossible to determine whether a standard of care beyond that was breached.

[151] WBM admits negligence when it struck the tree. This was a breach of the standard of care. It was reasonably foreseeable that a roadside obstruction could damage a Structure being moved. WBM knew that trees were on the route and had taken steps to avoid a tree strike by hiring Davey Tree. They did not take sufficient precautions to avoid the tree. As admitted, the standard of care was breached.

Did the La Traces suffer an injury or loss?

[152] There is no question that the La Traces suffered a loss. They had three intact Structures, the most valuable of which would, more likely than not, be the House. All were damaged. The two key questions in this case are:

- (a) What damage to the Structures was caused by WBM’s negligence?
- (b) What damages did the La Traces suffer as a result of WBM’s negligence?

Causation

[153] Causation is a highly significant issue that must be addressed in this case. The Structures were damaged. To what degree did WBM cause the damage? The resolution of this question is of undeniable importance to the quantification of damages – to which I will turn shortly - as the La Traces cannot in law be compensated for damages that were not caused by WBM.

[154] The legal principles that underpin causation have been stated many times in many different ways. From the jurisprudence and the academic analysis, a number of conclusions can be gleaned.

[155] While recognizing some limitations, the Supreme Court of Canada has retained the “but for” test as relevant and applicable in determining causation issues.³ The Supreme Court of Canada in *Clements v Clements*, 2012 SCC 32, noted the following on causation, at paras 6 and 8:

On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant’s negligence (breach of the standard of care) caused the injury. That link is causation.

...

³ In *Remedies in Tort*, the authors note the following about the requirement for causation:

Despite its obvious and acknowledged failings, the Supreme Court has stuck with the ‘but for’ test – but for the defendants’ actions would the plaintiff have been harmed? While there are very limited exceptions to this general rule, this test is particularly negative towards plaintiff’s claims because in situations of uncertainty and a lack of adequate information (i.e., it might or might not have been the ‘but for’ cause), the plaintiff will always lose (at para 16.6).

...The plaintiff must show on a balance of probabilities that “but for” the defendant’s negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant’s negligence was necessary to bring about the injury – in other words that the injury would not have occurred without the defendant’s negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[156] And, in *Nelson (City) v Marchi*, 2021 SCC 41, Karakatsanis and Martin, JJ writing for the Court, stated:

96 It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries. First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test. The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.

97 Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote. The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct. Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury.

(Citations omitted)

[157] Romaine J of this Court noted: “[i]f the damage would have occurred with or without the negligent conduct, there will be no recovery.” (*Neelands v Kelly*, 2014 ABQB 617 at para 245). Further, the but for test should be applied with a robust common-sense approach; inferences from the facts are sufficient to ground causation (*Clements* at para 9).⁴

[158] In *KY v Bahler*, 2023 ABKB 280, Renke J stated that the trier of fact infers cause from the evidence. His astute analysis is worth quoting at length:

⁴ See also *Donleavy v Ultramar Ltd*, 2019 ONCA 687 at paras 62, 72:

The "but for" test is generally applied in establishing causation in the tort of negligence. It requires a plaintiff to prove, on a balance of probabilities, that without the negligence of one of more of the defendants, the injury would not have occurred. A defendant's negligence is thus a necessary factor to bring about the injury...

...

...Causation is made out under the "but for" test if the negligence of a defendant caused the whole of the plaintiff's injury, or contributed, in some not insubstantial or immaterial way, to the injury that the plaintiff sustained. Causation requires a "substantial connection between the injury and the defendant's conduct"...

832 The inference of causation is for the trier of fact to make, for the judge in a trial by judge alone. As Professor Russell Brown, as he then was, pointed out, "An inference of cause-in-fact may be drawn (or not drawn) in all situations - that is, irrespective of whether there is expert evidence in only one direction, both directions, or no direction:" "Cause-in-Fact at the Supreme Court of Canada: Developments in Tort Law in 2012-2013" (2014), 64 SCLR (2d) 327-356 at paras 48, 49; *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25, Brown J at para 38 ("causation can be inferred - even in the face of inconclusive or contrary expert evidence - from other evidence, including merely circumstantial evidence").

833 The determination of factual causation is an inference from all the evidence: *Snell v Farrell* at 331; *Skinner v Matheson* at para 75; *Ediger v Johnston* at para 29; *Ghiassi v Singh*, 2018 ONCA 764 at para 25. The evidence will concern the acts or omissions of the defendant and the injury of the plaintiff. The injury will typically follow the act or omission. What is not directly in evidence, what is not directly observed, is an additional thing or event that is a "cause." To judge causation is to draw a conclusion about act or omission and the injury. Attribution of causation is not another observation. In "Known Unknowns in Cause-in-Fact?" (2011), 39 *Advocates Quarterly* 37, Professor Brown wrote as follows, in a Humean register, at 54:

Remember, evidence never speaks for itself. Where the evidence is being applied to determine cause-in-fact, this means that evidence never demonstrates causal linkage. Contrary to academic insistence upon "evidence of a probable connection between negligence and injury" (let alone "scientific evidence"), no such evidence ever exists in the sense of showing that X happened, and then X led to Y. All we can know is that X preceded Y. There is never evidence of cause-in-fact. All one can ever show is evidence of the defendant's risky behaviour (X) and the harm to the plaintiff (Y). To insist upon evidence of some sort of causal glue holding X and Y together-for example, causal glue tying Dr. Farrell's negligence to Mrs. Snell's blindness - is to insist upon something that does not exist, in that case or in any other.

[emphasis in original; footnotes omitted]

834 When assessing cause-in-fact, the trier of fact is entitled to take into account what actually occurred: *KS v Willox* at para 349(QB).

835 The approach to the inference of factual causation is to be "robust and pragmatic," in the sense that the trier of fact may draw inferences from the evidence "even though medical and scientific expertise cannot arrive at a definitive conclusion:" *Aristorenas v Comcare Health Services*, 2006 CanLII 33850, 216 OAC 161; *Snell v Farrell* at 330; *Clements v Clements* at para 10; *Benhaim v St-Germain*, 2016 SCC 48, Wagner J, as he then was, at para 54. As Professor Brown put it in "Known Unknowns" at 66:

Trial judges, therefore, ought not to be afraid to go where experts fear to tread

Confronted by scientific uncertainty, the next step is not to move on to apply another test for cause-in-fact, or to find for the defendant without further consideration of the evidence. Their job is to consider the evidence, the circumstances of the case, and then to draw or not draw a causal inference.

The determination of causation is "essentially a practical question of fact which can best be answered by ordinary common sense:" *Snell v Farrell* at 328, quoting *Alphacell Ltd v Woodward*, [1972] AC 824, [1972] 2 All ER 475 at 490 (HL). Justice Sopinka stated in *Snell v Farrell* at 336 that "it is not essential to have a positive medical opinion to support a finding of causation. Furthermore, it is not speculation but the application of common sense to draw such an inference where, as here, the circumstances, other than a positive medical opinion, permit."

836 Nonetheless, the "robust and pragmatic" approach is not a license for speculation or to deploy common sense to determine issues that properly fall within the scope of expert knowledge: *Goodman v Viljoen*, 2012 ONCA 896 at para 76. The robust and pragmatic approach is an approach to evidence not a substitute for evidence: *Aristorenas v Comcare* at para 54.

... ..

862 Even if a plaintiff establishes factual causation, the plaintiff must also establish that the injuries actually suffered were foreseeable or not too remote. This element of causation has been described as "legal causation" or "causation in law:" *Saadati v Moorhead*, 2017 SCC 28 at para 20; *Mustapha v Culligan* at para 11; *Meyers v Moscovitz* at paras 2-3; *McArdle v Cox* at para 24. According to Chief Justice McLachlin in *Mustapha v Culligan* at para 12,

[12] The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (Linden and Feldthusen, at p 360). Since *The Wagon Mound* (No. 1), the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tankship (U.K.) Ltd v Morts Dock & Engineering Co*, [1961] AC 388 (PC), at p 424).

Foreseeability is assessed in the circumstances of a defendant: *Gemoto* at para 509. See also *Brough v Yipp* at paras 604-609.

863 The injury or loss must not simply have been "possible" (occurrence proved possibility). Rather the injury must have been a real risk which "would occur to the mind of a reasonable man in the position of the defendant.... and which he would not brush aside as far-fetched:" *Mustapha v Culligan* at para 13; *Phillip v Bablitz*, 2011 ABCA 383, leave app reld [2012] SCCA No 85; *Skinner v Matheson* at para 69.

864 The issue is whether the class, type, or kind of injury was foreseeable, not the extent of the actual injury or the precise manner of its occurrence...

[159] I also consider Burns J's comments in *Malton v Attia*, 2021 ABQB 503 at para 102:

A finding of a breach of the standard of care does not necessarily mean that the Plaintiff is entitled to damages: *Snell v Farrell*, [1990] 2 SCR 311; *St. Jean v Mercier*, 2002 SCC 15 at para 116, [2002] 1 SCR 491. The Plaintiff must establish on the balance of probabilities that the defendant's action caused foreseeable damages. Causation can generally be established only if the plaintiff's injury would not have occurred but for the contribution of the negligent act: *Clements (Litigation Guardian of) v Clements*, 2012 SCC 32 at para 46, [2012] 2 SCR 181. Nonetheless, the causation test is not to be applied too rigidly: *Clements* at para 46.

[160] And in *Hanson-Tasker v Ewart*, 2023 BCCA 463 the Court noted:

80 It will be helpful, at the outset, to restate, in a non-exhaustive way, some of the foundational principles respecting proof of causation in negligence actions that are of particular relevance to this appeal:

- The "but for" test is the generally applicable test for proof of causation. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred: *Clements* at para 8;
- In all cases, the plaintiff assumes the burden of proving causation on a balance of probabilities: *Ediger* at para 36. Causation need not, however, be proven with scientific precision: *Snell* at 328. This is because the law requires proof of causation only on a balance of probabilities. Courts should take a "robust and pragmatic" approach to the facts and may draw inferences of causation based on common sense": *Benhaim* at para 54;
- In medical malpractice cases, the defendant is often in a better position than the plaintiff to determine the cause of the injury: *Snell* at 322. In weighing the evidence, the trier of fact may, therefore, consider the relative ability of each party to present evidence on a fact in issue. To borrow the words of Lord Mansfield in *Blatch v Archer* (1774), 1 Cowp 63, 98 ER 969 at p 970, "evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted";
- In some cases, it may be that very little affirmative evidence on the part of the plaintiff will justify the drawing of a common-sense inference of causation in the absence of "sufficient evidence to the contrary": *Snell* at 328–29; *Benhaim* at para 54. As the Court put it in *Ediger* at para 36, "[t]he trier of fact may, upon weighing the

evidence, draw an inference against a defendant who does not introduce sufficient evidence contrary to that which supports the plaintiff's theory of causation";

- Put differently, in cases of negligently-created causal uncertainty where a plaintiff adduces some evidence of causation, it is open to a trial judge to draw a causal inference unfavourable to the defendant that serves to discharge the plaintiff's burden of proof: *Benhaim* at para 42. The inference operates as something of a counterweight, offsetting the imbalance and consequent unfairness that may arise, particularly when a defendant seeks shelter in the evidentiary vacuum created by their own negligence and relies on the burden of proof shouldered by the plaintiff to defeat the claim. The underlying policy goal seeks to balance two considerations: (1) ensuring that defendants are held liable for injuries only where there is a substantial connection between the injuries and their fault; and (2) preventing defendants from benefiting from the uncertainty created by their own negligence: *Benhaim* at para 66;

- The available inference is permissive, not mandatory. It is simply a component of the fact-finding process, and one that is not unique to this context: *Benhaim* at paras 54-55. Whether to draw a causal inference unfavourable to the defendant is a matter best left to the discretion of the trial judge: *Benhaim* at para 52;

- Further, whether to draw the inference must be based on an evaluation of all of the evidence, including the weaknesses in the plaintiff's expert evidence relating to causation: *Benhaim* at paras 44, 52. As noted in Allan M. Linden et al, *Canadian Tort Law*, 12th ed (Toronto: LexisNexis Canada Inc, 2022), at s. 4.03:

An inference of causation can always be rebutted by other, more probative evidence; therefore, the inference approach to causation can have the effect of flushing out causal evidence in circumstances where it otherwise might be tactically withheld.

[161] The Structures were damaged while they were in WBM's care and control. But for WBM's negligent conduct, the damage would not have occurred. The admitted conduct is the tree strike.

[162] WBM was negligent in moving the House. There was a duty of care, and the standard of care – to take reasonable care to not damage the Structures while WBM had them in its possession – was not met.

[163] The loss claimed by the La Traces must now be considered. Did WBM's conduct lead to the claim that is now being advanced? Are there damages being claimed that would have occurred without WBM's involvement? The damages must follow the act or omission of the Defendant.

[164] The burden of proof rests on the La Traces. I will now turn to the question of damages, which is intertwined with causation. WBM can only be liable in law for damages that are the fault of WBM.

VI. Damages

Contract and Tort

[165] From the pleadings, arguments, and trial evidence, one can reasonably conclude that the La Traces seek damages concurrently in tort and breach of contract.

[166] Where there has been a breach of contract, damages serve to place the plaintiff “in the same position as he would have been in if the contract had been performed”: **Wertheim v Chicoutimi Pulp Co**, [1911] AC 301 at 307 (PC). Therefore, the purpose of any award of damages in contract seeks to place the innocent party in the position they would have been in had all parties performed the contract: Harvin Pitch, Ronald Snyder, *Damages for Breach of Contract*, 2nd Ed (Toronto: Carswell, 2024) at 1:1 (*Damages*). Assessing damages for breach of contract considers both the benefit lost from the breach of contract and the costs incurred by the party seeking damages as a result of the breach: *Damages* at 1:1.

[167] Damages in the tort context are retrospective or backward looking. The goal of tort damages is to place the innocent party in the position they were in before the wrongful act was committed as far as it is possible to do so. Monetary damages are awarded in an attempt to “put the plaintiff who has been injured, or who has suffered, in the same position he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”: **Andrews v Grand & Toy Alta Ltd** (1978), 83 DLR (3d) 452 at 462 (SCC), citing *Livingstone v Rawyards Coal Co* (1880), 5 App Cas 25 at 39 (HL).

[168] Concurrent liability in tort and breach of contract will usually result in the same award of damages as “it would be anomalous to award a different level of damages for what is essentially the same wrong”: **British Columbia Hydro and Power Authority v BG Checo International Ltd**, [1993] 1 SCR 12 at para 47 [**BG Checo**]. However, in some circumstances, the case facts will result in different damages in tort versus contract law: See **BG Checo; Simkin v Osburn** (1998), 40 CLR (2d) 119 (BCSC); **Barber v Vrozos**, 2010 ONCA 570 CA).

Damages: the Law

[169] When a plaintiff’s property is lost or damaged, the principle of *restitution in integrum* generally applies, which grounds the plaintiff’s entitlement to the amount required to place them in the position they would have been in had the property not been lost or damaged (Leith J and Hutchinson, A, eds, *Remedies in Tort* (Thomson Reuters Canada, looseleaf at 30:94) [*Remedies in Tort*]).

[170] Generally, when property is *lost*, damages are calculated based on the value of the lost property. When property is *damaged*, the calculation of damages is based on the reasonable cost of repair or replacement. If, despite repair, the property’s market value remains lower than before, the plaintiff may also be entitled to damages for the decrease in value. (*Remedies in Tort* at 30:94).

[171] In **Nan v Black Pine Manufacturing Ltd**, [1991] 80 DLR (4th) 153 (BCCA) [**Nan**], the plaintiffs’ house was destroyed by fire due to the defendant’s negligence. The trial judge

awarded full replacement costs of the home, which was upheld on appeal. The house was 13 years old at the time of the fire. The defendant argued that the damages should be reduced to reflect betterment – that is, the plaintiffs got a brand-new home, not a 13-year-old home. The trial judge determined that the defendant failed to establish betterment. Even if the trial judge accepted the defendant's (problematic) appraisal report, which gave the home and land a pre-fire value that was less than the replacement cost, there was no evidence to show that the new replacement home had greater market value. The Court of Appeal found no error.

[172] I underscore that *Nan* does not necessarily stand for the proposition that replacement value is the measure of damages in all cases or is some sort of default position. For example, in *Taylor v King*, [1993] 32 BCAC 56 (BCCA) a cottage was destroyed due to the defendant's negligence. The British Columbia Court of Appeal held that diminution in value was the appropriate approach to assess damages in the circumstances and, at para 62, relied on the following passage from *McGregor on Damages*, 15 ed (1988):

The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort but **the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished**. The test which appears to be the appropriate one is the reasonableness of the plaintiff's desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in the value of the land.

(emphasis added)

[173] When the replacement of a destroyed or damaged item results in an improvement that benefits the plaintiff, this is known as betterment. In *Vermilion & District Housing Foundation v Binder Construction Ltd*, 2017 ABQB 365, Nielsen J (as he then was) discussed the concept of betterment (and references *Nan*), at paras 189-195:

189 SM Waddams, in *The Law of Damages* at 1.2730, noted that a plaintiff often will not be able to restore herself to her pre-loss position in making good damage to property without improving it. Waddams provided the following illustration:

If the plaintiff's 10 year old roof is damaged, she will not be able to purchase a replacement 10 year old roof. The only reasonable course will be to replace with a new roof. If roofs have a life of 20 years, and the defendant is compelled to pay the full cost of the replacement, the plaintiff will be in a better position after satisfaction of the judgment than if the damage had not occurred in the first place. **It would seem, therefore, that the damages should be reduced by the value of the improvement of the plaintiff's position.** . . . [citations omitted]

190 Waddams at 1.2760 notes that Canadian case law supports the view that the proper measure of damages is the **reasonable cost of repair less any**

enhancement if the replaced article is more valuable than before the accident.

191 In *James Street Hardware & Furniture Co v Spizziri* (1987), 62 OR (2d) 385, [1987] OJ No 1022 (Ont CA) the Court espoused the general principle that the amount by which the plaintiff's property is improved should be deducted from the award, but the plaintiff should also be compensated to the extent the plaintiff has had to put out money prematurely to obtain that betterment. The Court held that the process should not be unnecessarily complicated or rule-ridden, and should be responsive to the particular facts of the case, noting that the mere substituting of new for old may well not involve any increase in the value of the property as a whole in many cases.

192 Macklin J, in *Lamont Health Care Centre v Delnor Construction Ltd*, 2003 ABQB 998, [2003] AJ No 1511 (Alta QB), cited *Nan v Black Pine Manufacturing Ltd* (1991), 80 DLR (4th) 153, [1991] BCJ No 910 (BC CA) for the proposition that there is no requirement that damages be adjusted automatically to reflect betterment; it is merely a factor to be considered. *Nan* was more recently cited with approval on this point in *Laichkwiltach Enterprises Ltd v "Pacific Faith" (The)*, 2009 BCCA 157, [2009] BCJ No 689 (BC CA) at para 36 and *Jarbeau v McLean*, 2017 ONCA 115, [2017] OJ No 717 (Ont CA) at para 56.

193 In *Nan*, the owners rebuilt their residence which had been destroyed by fire resulting from negligent installation of a heater. The Court held that the plaintiff was not required to finance any "betterment" that was a necessary result of rebuilding. In considering whether any adjustment should be made to reflect depreciation or betterment, Wood J.A. emphasized that **every case will turn on its particular facts**.

194 In *Lamont Health Care Centre*, Macklin J considered this principle in determining that the replacement cost was not an appropriate starting point where a new facility was built to replace an old facility that would have been demolished and replaced regardless of the fire which had destroyed it.

195 Finally, it is well established that the onus is on the party asserting betterment to prove it: *James Street Hardware and Furniture Co; Nan*.

(emphasis added)

[174] *Gendron v Doug C Thompson Ltd (Thompson Fuels)*, 2019 ONCA 293 involved oil leak contamination that led to the demolition of the plaintiff's house. At the time of demolition, the house was in poor condition and had a market value of \$175,000. The plaintiff sought the estimated replacement cost of \$545,244.25 to rebuild the home. This amount included \$476,594.25 to rebuild the home as close as possible to the existing home, plus \$68,650 of adjustments to account for certain finishes such as wood cabinets and a stone fireplace, which were in the demolished home but not included in the replacement estimate.

[175] The trial judge, relying on *Nan*, held that the principle of betterment does not strictly apply to dwellings. The Court found that the estimated replacement cost to rebuild the residence was \$476,594.25 and ordered this amount in damages. No contrary evidence was tendered with respect to the replacement cost and the estimate appeared reasonable.

[176] The Court of Appeal upheld the assessment of damages in relation to the replacement value of the residence, varying the damages slightly because, as part of the estimate of replacement cost, a figure was included to pay out an existing line of credit. The Court of Appeal held that this was not an appropriate component of rebuilding and constituted betterment to the plaintiff – he was placed in a better position than before the negligence – and ordered the line of credit payment be deducted from the damages award. Leave to appeal to the Supreme Court of Canada was refused ([2019] SCCA No 228).

[177] Damages for breach of contract are based on the same general idea: a damages award should put the Plaintiffs back in the position they were in prior to the breach of contract by the Defendant.

[178] Finally, the Court must determine the date from which damages ought to be assessed.

[179] Canadian jurisprudence has accepted the breach date rule found in the UK case of **Re United Ry Of Havana and Regla Warehouses**, [1961] AC 1007 [**Ry Havana**]: See also **Custodian v Blucher**, [1927] SCR 420 and **Gatineau Power Co v Crown Life Insurance Co**, [1945] SCR 655. The breach date rule calculates the damages on the date of the breach, with the assumption that this value is best used to calculate the cost of mitigation by the innocent party.

[180] However, as the Supreme Court of Canada found in **Semelhago v Paramadevan**, [1996] 2 SCR 415, though damages are typically assessed on the date of breach there is flexibility in the assessment when there are unique circumstances. Ultimately, a “‘fair’ date for assessment of damages will typically be the date on which the innocent party first had a reasonable opportunity to mitigate his or her loss”: *Damages* at 13:4.

Damages: the Evidence

Lay Evidence

[181] I would like to make a few brief comments on witness credibility and reliability, particularly as it relates to the damages claimed.

[182] Although a criminal case, the principles outlined by Green J in **R v Taylor**, 2010 ONCJ 396 at para 58 usefully summarize credibility and reliability and the differences between those concepts:

“Credibility” is omnibus shorthand for a broad range of factors bearing on an assessment of the testimonial trustworthiness of witnesses. It has two generally distinct aspects or dimensions: honesty (sometimes, if confusingly, itself called “credibility”) and reliability. The first, honesty, speaks to a witness’ sincerity, candour and truthfulness in the witness box. The second, reliability, refers to a complex admixture of cognitive, psychological, developmental, cultural, temporal and environmental factors that impact on the accuracy of a witness’ perception, memory and, ultimately, testimonial recitation. The evidence of even an honest witness may still be of dubious reliability.

[183] A broad view of the entirety of the evidence must be taken. It is not just about demeanour or testimonial performance. In **Faryna v Chorny**, 1951 CanLII 252 (BCCA) at 357 the Court held:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an **examination of its consistency with the probabilities that surround the currently existing conditions**. In short, the real test of the truth of the story of the witness in such a case must be **its harmony with the preponderance of the probabilities** which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth.

(emphasis added)

[184] While demeanour is only one factor in the credibility assessment process, the animus expressed by the La Traces towards Mr. Warkentin, in my view, made it more likely than not that they lacked objective recall of what happened in their dealings with him. The facts were clouded by their personal judgment. While I appreciate the importance of this litigation and the sense of grievance and the difficulties the La Traces experienced – and not without reason – their lack of perspective at times undermined the credibility of their testimony.

[185] For example, in her testimony, Ms. La Trace refers to Mr. Warkentin as a “shyster”, stating that he “snuck in” to do work on their property, that he “threatened to steal the gazebo for money” when he was not paid, asserting that “he could never be trusted with what he was telling us”, “he misled us”, and referring to Mr. Warkentin’s communications at different times as a “complete lie”, “lie, an outright lie”, “there was deception”, that he committed “cheque fraud” and engaged in “frightening” behaviour. Mr. La Trace referred to Mr. Warkentin as an “idiot” and testified that this situation “destroyed our lives for six years and I regret the day I ever met Wayne Warkentin”.

[186] Rather than seeing WBM’s efforts to mitigate structural conditions which were beyond everyone’s control, WBM was blamed for the problem. For example, Ms. La Trace’s response to Mr. Warkentin’s assessment that the bricks on the House had to be removed was that he wanted to “cheap out”.

[187] These emotions came through in cross-examination, particularly with Ms. La Trace who was, at times, combative and entrenched herself in views that were clearly wrong. For example, in response to the simple proposition that she paid \$5000 for the House, Garage Roof and Gazebo, she took the nonsensical position that “you can’t buy a house that belongs to someone else’s property” and would not waver.

[188] Feelings of personal animosity are not evidence that is relevant to the issues in this case. Certainly, there were mistakes made and statements that turned out to be inaccurate, but that does not justify the harsh labelling of Mr. Warkentin’s motives and actions in which the La Traces engaged.

[189] Mr. Warkentin testified professionally, calmly, and without vitriol. He was fair minded in his assessment of what happened and had reasonable recollection. In the face of deeply personal

attacks, which he personally sat through, he remained issue focused. He made admissions against his own apparent interest, for example:

- (a) He admitted that during the tree strike he was preoccupied with the back wheels of the truck and despite having spotters, the team's focus was on the truck wheels to ensure the house did not tip. He stated he believed they could navigate around the trees with their dollies but were not able to do so on the day of the move. He acknowledged it was his responsibility to move the House to the La Trace Property without hitting trees and he failed in this.
- (b) When Mr. La Trace refused to pay after the Structures were moved to the La Trace Property, Mr. Warkentin admitted he said he "will come get that gazebo, how's that sound for payment".
- (c) He admitted that taking deposits was a business practice he had engaged in, but he was not aware that WBM "needed a license to take a deposit". Mr. Warkentin stated he no longer took deposits from customers.
- (d) He admitted he attempted to cash the cheque made for CN Rail from the La Traces, though by mistake. The money was subsequently removed from the WBM account.
- (e) He admitted that his team broke the Garage Roof rafter with the bucket of the bob cat, but he did not inform the La Traces or his insurers of this accident.

[190] In short, where there is a discrepancy in the evidence between the La Traces and Mr. Warkentin that is not corroborated or otherwise supported by the whole of the evidence (documentary or otherwise), I accept the evidence of Mr. Warkentin.

[191] The La Traces contend, essentially, that every loss they experienced as a result of buying the Structures and moving them is WBM's fault. In its essence, they want a new house built, out of pocket expenses, and other damages. In their Written Submissions, the La Traces sought damages for the following:

- House rebuild
- Disgorged profits
- Line lifts and extra billings
- Special damages including thrown away insurance, thrown away expired permits, contractors to mitigate central feature, maintenance, mitigation, backfill, engineer reports, road ban charges-delay, lost rent
- General damages
- Punitive damages

[192] WBM takes the position that it caused the tree strike, and the damages from the tree strike are limited to repair, not replacement.

[193] The real issue is whether or not the Structures could have been repaired or needed to be rebuilt at the time that the damage was incurred; i.e. during and immediately after the move (**Ry Havana**).

[194] Ms. La Trace’s evidence is that she did not give money to the owner for the Structures. She paid Mr. Van Tetering. There is no evidence from Mr. Van Tetering. The evidence establishes that Mr. Van Tetering was directed to give the Structures away. Thus, the Structures were of little to (most likely) no value to the owner. In fact, they represented an obstacle. This is supported by an email to Mr. Van Tetering from an individual named Andrew Lytovchenko saying that Goldman “provided authorization to salvage the house (give it away). This extends to other buildings. Whatever lowers the cost of cleanup to the owners, give/take it away”.

[195] Thus, it is reasonable to conclude that the Structures had no value to the owners.

[196] So, a starting point is the pecuniary loss suffered by the La Traces based on what they paid for assets that had no market value: \$5,000.

[197] This is related to Ms. La Trace’s odd assertion that she was “buying the opportunity to take the house and [Van Tetering] was going to reduce the remediation contractor’s price”. She insisted that “[a person] can’t buy someone else’s home on real property”. This is simply wrong.⁵

[198] As evidenced by the interactions between Ms. La Trace and the remediation contractor, the sale of the Structures was an attempt by the owners to reduce costs. The Structures would be demolished if they could not be removed from the Leduc Property. After the sale of the Structures, Ms. La Trace intended to remove the Structures from the Leduc Property to the La Trace Property. The Structures could no longer be considered as fixtures as neither the owner nor the La Traces objectively intended for them to enhance the land. They can no longer be considered fixtures on the land.

[199] No appraisal was done of the House value, therefore there is no objective evidence of what the House was worth. Ms. La Trace obtained an insurance appraisal over the phone, but she questions its accuracy due to inaccurate information that she supplied about measurements.

[200] The only evidence the Court has of the House value prior to the move and prior to the developer formulating the plan to dispose of it comes from Helmut Nickel. The Nickel Affidavit is not an expert opinion but forms part of the factual matrix. He states that the House “... was a very difficult and labor-intensive work of love that I told La Traces I valued at \$80,000 when I built it, and some \$100,000 in 2016”. However, Mr. Nickel also states the following at paragraph 6 of the Nickel Affidavit:

⁵ In consideration of whether the Structures were chattels or fixtures, according to Professor Bruce Ziff in *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada, 2018):

the determination of whether a chattel has been transformed into a fixture is a matter of intention, objectively determined ... The test is whether the purpose of the attachment was: (a) to enhance the land (which leads to the conclusion that a fixture exists); or (b) for the better use of the chattel as a chattel.

See also: *ABS Trucking Ltd v Edmonton (City)*, 2011 ABCA 353 and *Cavendish Farms Corporation v Lethbridge (City)*, 2024 ABKB 768.

6. My son's brick house was less than 20 years old when a developer offered to buy my land and buildings, which would also have to include the brick bungalow I built for my son. It was simply an offer to good to refuse.

a) Realtor Linda Lyons Boucher of Royal LePage had appraised my son's brick house without land at \$850,000.

b) When I decided to accept Qualico's offer to purchase my property, my son received \$850,000 of the sale proceeds to compensate him for the house based on Ms. Lyons Boucher's appraisal.

[201] This assertion is not helpful in determining the value of the Structures in that it refers to a purchase and sale without particulars, without documentation, and stands in sharp contrast to the clear evidence that the owner of the Leduc Property valued the Structures at \$5,000.

[202] I note parenthetically that Mr. Nickel specifically states that the La Traces interviewed him and Ms. La Trace typed the Affidavit for him. Mr. Nickel's evidence cannot be tested. The Nickel Affidavit is not convincing.

Expert Evidence

[203] I will now turn to the expert evidence.

[204] The La Traces called five experts: Eldon Schechtel, Robert Bourdages, Chris Holden, Arlin Cornelius, and Alan Cahoon. The La Traces also entered the MR Engineering as an administrative exhibit.

[205] WBM called three experts: Gregory Bowker, Rob Clarke, and Verlin Koch.

[206] The expert evidence relates to the key issues in this trial: the value of the Structures, the cost of repair, the cost of rebuild, and thus, the determination of the La Traces' claim for damages.

La Traces' Expert Evidence

Eldon Schechtel

[207] Mr. Schechtel attended at the property on August 17, 2020. His first report is dated August 24, 2020. Mr. Schechtel was qualified as an expert in the field of residential foundation framing, general construction, and the structural integrity of residential homes, with the ability to assess and opine on damages and cause of damages and with the further ability to provide assessments with respect to residential construction and repairs, including costing. He was also qualified to speak to the effect on building components of home moving and requirements on how to move a home without damage.

[208] Mr. Schechtel noted that the House hit something during the move and places responsibility for the damage to the House on WBM. He states: "I am convinced that this building sustained all of the damage while being moved and placed onto the foundation, excepting minor drywall damage and broken windows caused by vandalism."

[209] In terms of specifics, Mr. Schechtel opines that:

a) the floor joists were not supported or protected adequately during the move;

b) the wracking of the roof and walls resulted from inadequate support; and

- c) due to the severity of the problems, the building could not have been placed on its foundation.

[210] Mr. Schechtel concludes:

I am firmly convinced that due to the amount of damage to the super structure, brick veneer and interior finish, it's unrealistic to undertake repairs as I know of no practical way to restore this building to its original or near original state, the only part of it that can be salvaged is the centrally located stone fireplace and the foundation.

[211] Mr. Schechtel conducted a second inspection on October 19, 2021, and issued a second report dated October 23, 2021.

[212] In this second report, Mr. Schechtel states that the structure has been through two more winters since his first inspection. He expressed concern about the structural integrity of the foundation and the fireplace and urged remediation of health risks posed by mould and bird dung, and the dung odor, which he does not believe could be eliminated. He states:

My initial report states that the entire house (roof, wall and floor) are racking due to inadequate support when moving causing extensive drywall, flooring, and overall damage. After a closer review of the overall damage I have come to the conclusion that a large portion of the racking, perhaps 2/3 of it, resulted from striking something while being moved.

[213] I also note that Mr. Schechtel believes that movers are responsible for structural integrity and for covering a structure, and if they do not, the homeowners can hire someone, and the mover should pay the bill.

[214] He also stated that damage occurred due to the lack of compression reinforcing and absence of squash blocking. The majority of the damage to the House is racking, which, in his view, cannot be caused by exposure to the elements.

[215] An engineer should have been consulted with respect to the floor joists in his opinion. The cut in the House was done poorly and professional help would be needed to piece the parts back together.

[216] Mr. Schechtel conducted an inspection but also received information from the La Traces. A significant amount of time passed between the move date and his investigations: four years. He also opines on matters (squash blocking, cut quality) that are not his area of expertise.

[217] In my view, less weight is to be placed on Mr. Schechtel's opinion given these temporal limitations, particularly in relation to the repair or replacement determination. While Mr. Schechtel remains firmly of the view that the House and Garage are not salvageable, the passage of time between the move and Mr. Schechtel's inspections diminish the weight of his opinion. After the passage of four years, it becomes difficult to differentiate between causes of damage, a conclusion that is not weakened by Mr. Schechtel's opinion.

[218] His statement that the mover is responsible for covering the House to prevent exposure to the elements is contrary to the arrangement made between the La Traces and WBM.

[219] Mr. Schechtel also conceded that the elements can destroy houses, but it depends on the weather conditions.

[220] Further, it is noteworthy that his second report goes some distance towards supporting WBM's contention that the damage to the building was caused by the tree strike and that weather and exposure to the elements can damage buildings.

Robert Bourdages

[221] Stantec's Robert Bourdages was commissioned to complete a visual condition assessment of the House, which is divided into two parts: the rectangular area and the hexagonal area. Stantec's scope did not include the master bedroom or the Garage Roof. He provided three reports in evidence, dated September 29, 2016, November 18, 2016, and December 8, 2016, respectively.

[222] Mr. Bourdages was qualified as an expert in the areas of structural engineering and timber framing, causation of structural engineering failures, general repair and rebuild costs on a qualitative, not quantitative, basis, general repair opinions on design and retrofitting, and water infiltration and mold.

[223] Stantec's field review occurred closer in time to the move than that of Mr. Schechtel. Someone from Stantec was on site on September 9, 2016, just over eight months after the move.

[224] In the November 18, 2016, structural assessment, Mr. Bourdages identified significant damage to the interior and exterior finishes, but states that it is difficult to distinguish between damage caused by transport or damage due to exposure to the elements that had occurred since January 2016. Mr. Bourdages specifically discussed six structural concerns related to the rectangular area and hexagonal area: unsupported covered deck roof; unsupported floor beams; buckling floor joists near master bedroom; rotated edge beam, separated brick, sloped interior floor; unsupported edge beam and crushed interior joist; impacted damaged exterior and separated brick and gypsum board.

[225] The House was described as being in an unsafe structural condition. He stated that the structural damage resulted from inadequate support while off the trailer or impact during transportation.

[226] Mr. Bourdages testified that roof joint separation was likely caused by the impact. Water or snow could have damaged the wood elements during the move.

[227] Further, Mr. Bourdages stated that all damaged structural members need to be replaced prior to anyone occupying the House.

[228] Subsequently, Mr. Bourdages issued a letter dated August 21, 2020, stating that the December 8, 2016, report can no longer be signed and sealed by Stantec due to the passage of time between the date the report was written and a recent request from the La Traces for signature. However, the 2017 report is nevertheless deemed to be accurate.

[229] Stantec concluded that its observations of damage to the House, made in its Field Review Draft Report, would require significant cost expenditure to remediate and repair: "[i]t is our belief that such costs, in the aggregate, may exceed the cost of demolition and reconstruction of the superstructure. Final determination of cost would require a detailed estimate prepared by a registered Quantity Surveyor."

[230] The Stantec report is equivocal on cause (support off trailer or impact), refers to replacement of damaged structural elements and defers determination of the efficacy of repair versus demolition and reconstruction to a quantity surveyor.

[231] Therefore, I place only moderate weight on this report on the issue of whether or not repair or replacement would be the correct measure of damages suffered by the La Traces and on questions of causation. It is clear that even by November 2016, the distinction between damage caused by the move and damage caused by exposure to the elements had at least begun to blur.

[232] Further, Mr. Bourdages' conclusions support, to some degree, the argument that replacement would result in betterment by the time Stantec became involved months after the move.

Chris Holden

[233] Chris Holden is a quantity surveyor whose mandate was to provide an independent opinion on the cost to rebuild the Home. He did not visit the La Trace Property to inspect the House until January 27, 2020, four years after the move.

[234] Mr. Holden's report – entitled Assessment of Replacement Cost of House - was issued in July 2020 and posits that the approximate cost of rebuilding the House - a single-story house with attached garage on unfinished basement - was between \$886,403 and \$904,536 excluding GST.

[235] In reaching this conclusion Mr. Holden reviewed floor plans, elevations, quotations provided by subtrades, and examined photographs. His considerations included measurements, current pricing from a construction pricing database, and quotations provided by the La Traces. Mr. Holden concluded that the cost to build the House, at the time of his report in 2020, ranged from \$399.64 per square foot to \$424.05 per square foot.

[236] Mr. Holden noted that the Construction Cost Guide 2020 as published by Cuthbert Smith Group shows a typical cost for high end house construction as \$294 per square foot. However, "the central feature is driving the cost of the house up beyond the typical high-end house range."

[237] He did not recommend repair, which he says would cost \$1,200,453 excluding GST.

[238] Mr. Holden assumed that the foundations needed to be replaced (kept separate from main estimate), framing needed to be replaced throughout – drywall, exterior cladding, roof finishes, wall, floor, and ceiling finishes needed to be completely replaced.

[239] Mr. Holden provided a rebuttal to the ParioQuantify Surveyor [**Pario**] report in October 2021. That report will be discussed later in these Reasons. Mr. Holden concluded that the price of a tear down and rebuild of a new House, with basement and garage, would be \$1,116,415 excluding GST based on a cost of the house at \$336.36 per square foot. This is calculated by dividing the total cost by the gross floor area of the main floor only (House and Garage). Mr. Holden cited changed market conditions, and that the "central feature and demolition of existing house is driving the cost of the house up beyond the typical high-end house range."

[240] Mr. Holden also noted that Pario assumed the wood structure of the house was salvageable and did not consider water damage to wood framing and sheathing; bird and small animal feces throughout the house; and made no allowance for work on the foundations, which had been left largely exposed since the move. Pario made an allowance for straightening the structure, which Mr. Holden did not think adequately addressed the seriousness of the twisting and racking mentioned in the experts' reports.

[241] The Court has several concerns about Mr. Holden's report that diminish the weight of his opinion, particularly in light of the Pario Report. These include:

- a) The Pario Report pricing appears to be from 2016, which is closer in time to the date that WBM performed the move and placement. It is not clear why Mr. Holden could not provide pricing as of the date that WBM was involved with the Structures.
- b) Mr. Holden's premise was rebuild, not repair. He cited emails from subtrades stating that parts of the house are not salvageable. Their site visit "indicated that in numerous areas work would have to be demolished completely and rebuilt completely. One of the main items is the main floor frame which is buckled and twisted. We believe that it would be more economic to demolish and rebuild the house". However, Mr. Holden did not visit the site until four years after the move, during which time period the Structures were exposed to the elements. Mr. Holden's opinion on causation and on rebuild or repair options is largely theoretical and cannot be grounded in fact.
- c) He priced the building of a new garage, which was not actually part of the move.
- d) The cost of building a foundation is included; this was obviously not part of the move.

[242] I do not place weight on this report; its use is confined to acting as a gloss on the Pario Report.

Arlin Cornelius

[243] Arlin Cornelius spent his career working as a residential foundation and framing contractor. He worked for the La Traces on various projects for over 30 years.

[244] Mr. Cornelius was qualified to give opinion evidence on residential foundations, construction and repair, as well as framing, general construction, and insofar as possible, the structural integrity of residential homes.

[245] Mr. Cornelius provided two letters to the Court: one dated August 16, 2016 and the other dated August 8, 2020.

[246] Mr. Cornelius visited the House in September 2015, prior to the move. At that time, he noted no structural problems. Mr. Cornelius also saw the House after the move and noted, in his view, that it had suffered severe structural damage.

[247] The main part of the House had some structural damage to the floor system and drywall had come off the ceiling in two bedrooms. He also noted: "how the exterior brick had been supported using wood lagged in some fashion to the existing OSB rim board, certainly in my experience not capable of holding brick for any length of time in a stationary situation let alone the stress of flexing and movement due to being moved for several miles." He also noted damage to the roof overhang area above the entryway – "it appeared to have hit something and had caused the exterior entry way wall to pull away from the main structure".

[248] Although an engineer cleared the building as fixable, Mr. Cornelius thought starting from scratch would be a better option than repairing the building. He completed the Gazebo foundation in late October 2015 and the House foundation in April 2016.

[249] In his view, major deconstruction would be needed to repair the damage to the separated roof, walls, and floors. He noted the House should be set on the new foundation quickly to prevent further damage.

[250] In August 2020, Mr. Cornelius updated his earlier comments. He was present in November and December 2016 when WBM moved the House and master bedroom onto the House foundation.

[251] Mr. Cornelius noted further damage caused by WBM when placing the buildings on the foundations. After being placed the House remained severely twisted because of, in his view, improper blocking and unconventional moving methods.

[252] Mr. Cornelius was of the opinion the House was a write off when first moved and was further convinced of that position when he witnessed the move onto the foundation.

[253] I place little weight on Mr. Cornelius' opinion evidence. His expertise rests in foundations and certain areas of construction, and not on the question of repair or rebuild.

MR Engineering

[254] The La Traces tendered a Structural Assessment by MR Engineering as an administrative exhibit at trial. Mizanur Rahman visited the La Trace Property on March 28, 2016, within 60 days of the move. Mr. Rahman's purpose for the visit was to evaluate the overall structural condition of the House superstructure and to assess the current condition of its structural elements, including joists, roof trusses and framing.

[255] Mr. Rahman observed some damage to truss extensions outside of the exterior wall supporting the eavestroughs. There was no damage to the top chord, bottom chord and diagonals including the connections. The existing roof trusses were found to be structurally sound and acceptable.

[256] Mr. Rahman observed no damage to existing TJI joists and found that the TJI supports were acceptable, as were all the floor joists save for two, which were damaged.

[257] Significant cracks were found in exterior/interior drywall due to uneven support. Cracks and dislocations were found in masonry walls due to inadequate support. Ceiling drywall was dislocated.

[258] Mr. Rahman concludes that the overall condition of the structural components of the house could be rendered acceptable provided that the following work was completed:

- (a) Provision of proper support of the structure on its new foundation;
- (b) Repair of the damaged portion of the truss exteriors;
- (c) Repair and/or replacement of the damaged floor joists;
- (d) Provision of lateral support for the damaged floor joists;
- (e) Removal of dry wall to open up the wall studs and TJI roof joists;
- (f) Repair of the existing wall studs and TJI roof joists where required;
- (g) Provision of proper and adequate support for the masonry wall;
- (h) Provision of proper support beneath the fireplace;

- (i) Removal of separated roof sheeting and realignment of roof trusses where required; and
- (j) Removal of slate/tile flooring and subfloor to realign floor joists where necessary.

[259] The overall condition of the House was found to be satisfactory by this expert. The MR Engineering Structural Assessment, overall, can be reasonably characterized as a list of repairs that would restore the structural integrity and appearance of the House. The assessment was made close in time to the move and supports the conclusion that, on a balance of probabilities, the House could have been repaired at the time that it was damaged.

Defendant's Expert Evidence

Gregory Bowker

[260] Gregory Bowker testified as an expert in residential market value appraisals, post-loss market value appraisals of residential properties, retrospective market value appraisals of residential properties, and valuation of residential use structures not affixed to land and in a position to be moved. He provided an appraisal of the House based on retrospective market value as at the day before the move (January 25, 2016) in a report dated October 18, 2021.

[261] Mr. Bowker physically inspected the House, inside and out on February 3, 2020, four years after the move. He took photographs and compared them with pre-move photographs.

[262] In reaching his opinion, Mr. Bowker assumed that the House was available to be moved from its foundation at the Leduc Property and that a buyer would acquire the structure in its "as is" condition and be responsible for moving costs.

[263] Mr. Bowker testified that the "highest and best use" appraisal method is not employed when a chattel is to be moved, such as a ready to move home or mobile home. The definition of highest and best use does not include chattels. Chattel appraisals take into account the intended purpose of the chattel.

[264] Mr. Bowker characterized the House as "a good quality custom built home with some unique characteristics including a central stone fireplace with water feature, and full brick exterior." He described its condition prior to the move as "well below average": 'fair' for the purposes of comparison to comparable properties due to the level of damage apparent in the photos. Most of the windows had been shattered, exterior doors and interior walls were damaged and other general excessive cosmetic wear were observed.

[265] Mr. Bowker concluded that the House, as a chattel to be moved, assuming at least average condition, would likely have been worth between \$25,000 and \$50,000: "[o]ur research also indicated that good quality homes are offered for sale and often either end up getting demolished or sold for \$0 (plus moving charge)". He went on to say:

After considering the condition of the dwelling prior to its move, and the cost to repair and restore to a reasonable condition, it is our opinion that the value of the subject dwelling would have been \$0. The market data available supports the conclusion that despite the age, size and features of the dwelling, the value 'pre-move' was negligible.

[266] Mr. Bowker noted the La Traces paid \$5,000 to a demolition company for the House. In his view, the final value was predicated on the “Direct Comparison Approach” to valuing the House, which was considered adequately supported by the sales presented in his report and others that he reviewed.

[267] Notably, Mr. Bowker did not apply the “Cost Approach” to valuation because residential dwellings not designed to be moved typically sell well below replacement cost new values, despite physical depreciation factors. This is an important point, as the La Traces were permitted to call an expert to rebut Mr. Bowker’s conclusions.

[268] Mr. Bowker’s report is consistent with the conclusion that the House’s value was negligible or even nothing prior to the move.

Rob Clarke

[269] Mr. Clarke is a property appraiser at Pario with over two decades of experience in appraisals. He was qualified as an expert in the evaluation appraisal of residential property, the evaluation appraisal of property damages, construction project estimation of cost control, construction engineering technology, the use and application of the Xactimate program, wood frame structure design, and evaluation of the cost to repair residential property with emphasis on damage to residential properties. Mr. Clarke first visited the Structures on February 17, 2016, and prepared a report, including a repair estimate, that same day.

[270] Mr. Clarke was on site close in time to the move (a few weeks). His evidence is that the House sustained substantial exterior and interior damage from impact to the large octagon section. He stated:

- a) “[i]t is my opinion this is not ‘typical’ damage that occurs when moving a home. When looking at the section of home that did not hit a tree the ceiling and walls have no cracks or separations at the corners.”
- b) the House must be placed on level foundation before repairs take place:
 “[i]t is the opinion of the writer the building be repaired as per the scope of work provided here-in.”

[271] Mr. Clarke completed a further repair estimate dated October 17, 2021, which accounts for inflation since the original report.

[272] Mr. Clarke inspected the House on three occasions. He maintains that the House is reparable:

Following my three site inspections completed in 2016, 2017, and 2021 I was able to collect the required information to complete this repair estimate. I have reviewed the report prepared by KTA Structural Engineering and considered their structural concerns in this report.

[273] Applying a depreciation of 50% to all building materials, Mr. Clarke sets a Replacement Cost Value of \$245,635.32, less non-recoverable depreciation (\$33,986.30) which results in Actual Cash Value of \$211,457.43.

[274] Mr. Clarke revised his repair estimate in a report dated September 12, 2022. The revised Replacement Cost Value is \$338,206.37; depreciation is not included but this takes inflation into account.

[275] Mr. Clarke concluded that the House was reparable in the time period following the move. The part of the House that hit the tree was damaged by external force. The ceiling and walls of the part of the House that did not hit the tree “have no cracks or separations at the corners”.

Verlin Koch

[276] Mr. Koch is a structural engineer with KTA Structural Engineers Ltd. He was qualified as an expert in structural engineering, in particular on wood frame houses, causation of structural failure to a structure, repair or restoration of structural damage to a structure, reviewing and providing opinions on engineering reports or work, rot and water infiltration (including causation and avoidance). He is also qualified in building envelopes, including cladding; structural integrity of foundations and in particular, pouring of the concrete foundations for residential homes.

[277] Mr. Koch visited the site on October 6, 2021. He outlined his analysis and conclusions in a report dated October 13, 2021, entitled “House Inspection and Opinion on Cause and Extent of Damage”.

[278] Mr. Koch’s conclusions include the following:

- a) the House was unoccupied and unheated for several years before the move;
- b) photographs taken prior to the move do not show significant cracking in drywall or other interior finishes and the fireplace appears to be in good condition;
- c) the front door was removed, and other doors were left open;
- d) prior to the move the House had a number of broken or boarded up windows;
- e) there was some deterioration of and damage to drywall;
- f) bird excrement was visible on the floor in some areas.

[279] Mr. Koch did not observe significant cracking in the brick veneer prior to the move. He states:

The support of the brick veneer on a single storey house is usually done by the brick bearing on a support such as a steel angle or concrete. The brick ties from the brick to the house wall are used for lateral support of the brick and are not intended to provide support in the vertical direction. In the original configuration, the brick extended below the main floor and was supported on the foundation at or below the exterior grade. In order to move the house, the upper section of the brick, above the main floor require new support to be added.

[280] Mr. Koch also noted that there would normally be rim board or dimensional lumber or structural composite lumber. He understands there was no rim board other than a 3/8-inch OSB board (similar to plywood) attached to the end of the floor joists. This type of construction is not strong enough to have a steel angle iron attached to the rim board. WBM nailed or screwed a 2x6 piece of dimensional lumber, to the ends of the floor joists to support the brick. Mr. Koch did not have enough information to calculate the exact requirements for the attachment but properly

done this provides as much support as possible under the circumstances. Based on the photographs after placement on the moving beams, but prior to transport, this element of move preparation was adequately completed.

[281] Mr. Koch noted the House struck a tree during the move at a speed of 2-3 km per hour. He states: “[i]n my opinion, this is when most of the damage occurred” and:

The impact with the tree caused the house to rack, cracking the drywall in numerous locations. It enlarged the gaps in the reveals in the central living room and cracked the countertop in one location. A small crack occurred in the fireplace. There was some damage at the base of the fireplace at the floor opening where angles had been attached to support the stone. This was limited to a small area of about one foot by four feet.

[282] Mr. Koch indicated that:

(a) some roof damage was caused by the tree impact, with observed separation of roof sheathing at the ridge of the trusses and damage to outriggers on the roof at point of contact;

(b) the tree impact was the major cause of the brick damage; however, he notes that brick veneer results in very stiff construction and small movements can cause cracking. Vibration during the move could also cause some cracking from the movement and the attachment of the 2 x 6;

(c) The chimney damage was not caused by transport. The chimney appeared to have been adequately supported during the move. The damage occurred when a Bobcat Loader pushed the two sections of the house together; and

(d) The main floor framing was in good condition after the move with the exception of six floor joists. The drywall softening and general deterioration of drywall was caused by the house being unoccupied and unheated. Additional remedial work to the interior is mainly required due to having been unoccupied and unheated for an extended period of time.

[283] Mr. Koch’s report states:

The drywall on the main floor has been excessively damaged. Rather than repair the drywall, it is more cost effective to remove the drywall and insulation and replace the drywall and insulation. When this work is being done, note should be made of the quality of the insulation originally installed. With the drywall removed, the window openings that had been racked could be easily shifted back into their previous shape.

[284] He further noted that the brick can be patched to restore continuity. There were few cracks in the brick prior to the move. Some damage to the brick is to be expected, given the inherent rigidity of the brick versus wood frame. To repair brick in an aesthetically pleasing way, entire sections would have to be removed and reinstalled, possibly 30 percent of the surface area.

[285] The stonework on the fireplace along the opening needs repair and new supports are required to finish that area of the House. Adjustable steel columns under the fireplace were adequate to support it and the concrete block walls placed under the fireplace were not required for structural reasons.

[286] He stated:

- (a) To repair the trusses and outriggers at the location where the tree strike occurred requires removing the damaged outriggers and replacing them with new outriggers.
- (b) Joint repairs could be performed by a single carpenter as repairs are not very involved.
- (c) The major cause of damage to the floor joists was placement on the moving beams. This would have occurred when the beams were placed, and the house was lifted and transported.
- (d) Estimated time for repairs on the home (brick, drywall and insulation repair, frame straightening, refinishing to the floors, and roof repairs) to be 3 to 6 months (depending on material availability and manpower).
- (e) There are differences in the building code requirements which were set out for stationary houses and not for houses in transport which are less stringent.
- (f) Structural soundness is recognized as being able to withstand environmental, use and occupancy loads. Damages to structures that can be fixed does not mean there are structural integrity issues.

[287] Mr. Koch concluded: “[a]t this time, the house is structurally sound, but extensive remedial work is required. The damaged floor joists should be reinforced by adding another joist beside the existing damaged joist. This repair is relatively nominal.”

[288] Mr. Koch also visited the La Trace Property on September 14, 2022.

[289] Mr. Koch’s view is that the House was damaged during the move, mostly by the impact with the tree. That impact caused the house to rack, damaging the drywall and brick. The House is structurally sound. It requires extensive repairs to drywall and interior finishes. Drywall and insulation should be removed and replaced. Brick cracks should be patched with grout or removed and reinstalled.

[290] The House, in short, was reparable at the times that Mr. Koch inspected it.

La Traces’ Rebuttal Expert Evidence

Alan Cahoon

[291] Alan Cahoon was called by the La Traces to rebut Mr. Bowker’s conclusion that the House had no or negligible value. Mr. Cahoon was qualified as an expert in appraising residential-commercial properties with a specific emphasis on unique properties and circumstances, the analysis of appraisal reporting methodology, assessment and validity of those reports, and the technical review of appraisal reports completed by others.

[292] Mr. Cahoon conducted a personal site visit to the La Trace Property on October 29, 2021. He reviewed photographs in the Bowker Report, as well as additional photos provided by the La Traces.

[293] He critiqued Mr. Bowker on the following grounds:

- (a) Mr. Bowker did not indicate the remaining economic life of the property, noting that a 60 year lifespan is typically estimated for residential properties; this can be

longer for higher quality structures. There was reasonably 40 years of remaining economic life in the House.

- (b) The Bowker Report references four different sizes of the House, and the conversion between m2 and ft2 is incorrect.
- (c) Mr. Bowker committed a fundamental flaw by not completing a highest and best use analysis. This contributed to an unsupported opinion of value because the House could not remain at the Leduc Property: it was in a transitional state and its highest and best use was to be moved onto an alternate land base to allow it to function as a single family residence.
- (d) It is common practice, when appraising properties, to employ multiple approaches to value but Bowker only used the direct comparison approach. Mr. Bowker noted the cost approach was not considered applicable and that residential dwellings not designed to be moved typically sell well below replacement cost new figures: “[a]lthough this reasoning is not inaccurate, it is the opinion of the writer that this reasoning alone is not sufficient to exclude the Cost Approach valuation technique.”
- (e) Mr. Cahoon states: “...the writer is astounded that no consideration was given to completing the cost approach which, in the opinion of the writer, significantly lowers the reliability of the final value conclusions.... Excluding a valid valuation approach without an appropriate reason represents another fundamental flaw in the Bowker Report.”
- (f) Mr. Cahoon doubts the relevance of the \$5000 sale price in determining the true market value of the House. He notes that the price paid by the La Traces does not necessarily represent the value of the House. No weight should be placed on the price paid in his view.
- (g) Mr. Cahoon took issue with finding comparable sales information. From his discussions with others who work in this industry, the price of residential dwellings has gone up since the start of the Covid-19 Pandemic because of rising construction costs. He says these rising costs would mean it is logical to assume purchasers of used houses would be willing to pay a higher price. This contradicts the Bowker Report which says values have been in a decline and were higher in 2016.
- (h) Mr. Cahoon criticized the fact that adjustments were not made in the comparable sales section of the Bowker Report to recognize size, dates of construction, design, and so forth: “[t]he conclusions of the appraiser appear to be that due to the cost to repair and restore to a reasonable condition, the value of the subject dwelling of the structure ‘pre-move’ is \$0.”
- (i) He goes on to say that “[t]he writer is perplexed as to why there were no adjustments made to any of the comparable sales to recognize many of the notable superior aspects of the subject.” He was surprised that the value of the House remained unchanged, even after the square footage was corrected, since building size is one of the most commonly made adjustments when appraising a residential building.

[294] Mr. Cahoon concluded:

The writer is of the opinion that the Bowker Report involved two significant breaches of CUSPAP (Canadian Uniform Standards of Professional Appraisal Practice), by way of not completing a Highest and Best Use analysis and not completing a valid Cost Approach, which contributed to unsubstantiated valuation conclusions. In addition, there were no market supported adjustments to the comparable sales and no reference was made to any other research and/or discussions with other informed market participants which are knowledgeable in the unique market. Due to the way the report was completed, in conjunction with the number of errors and omissions noted throughout this report, it is the opinion of the writer that no reliance should be placed on the valuation conclusions of this report.

[295] While Mr. Cahoon's opinion is useful in that it represents a different approach to valuation of the House while it was on the Leduc Property, he does not offer a value himself. His mandate – which he discharged – was to criticize Mr. Bowker's report. He did that.

[296] Ultimately however, evidence concerning the value of the House prior to the move contributes to the replacement calculus, if replacement is the proper measure of damages in law.

Spoliation and Mitigation

[297] It is impossible on the evidence to conclude that all the damages suffered by the La Traces arose from WBM's acts or omissions. To what degree were damages incurred without WBM's contribution?

[298] Given the passage of time and how the Structures were cared for and maintained after the move, questions of spoliation and mitigation arise. I will turn to that issue now.

The Law: Spoliation

[299] Parties in civil litigation have a common law duty to take reasonable steps to preserve relevant evidence: Gideon Christian, "A 'Century' Overdue: Revisiting the Doctrine of Spoliation in the Age of Electronic Documents" (2022) 59:4 Alta L Rev 901 [**Christian**]. Spoliation refers to a situation "where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation": **McDougall v Black & Decker Canada Inc**, 2008 ABCA 353 at para 18 [**McDougall**]. The destruction of relevant evidence impacts the truth finding function of the Canadian justice system and the fair administration of justice

[300] The Supreme Court of Canada developed the doctrine of spoliation in **St Louis v The Queen**, [1896] 25 SCR 649 [**St Louis**]. The concept of keeping evidence stems from the maxim *omnia praesumuntur contra spoliatores* (all things are presumed against the wrongdoer) from Roman times: **St Louis** at 667. The SCC held that where spoliation can be established, there is a rebuttable presumption that "the evidence destroyed would have been unfavourable to the party who destroyed it": **St Louis** at 652-653. See also: **McDougall** at para 18; **Trillium Power Wind Corporation v Ontario**, 2023 ONCA 412. The spoliator can rebut the presumption through evidence that they did not intend to destroy the evidence with the aim of affecting the pending or contemplated litigation, or by other evidence to prove or defeat the argument: **McDougall** at paras 18, 29.

[301] Subsequent cases explored other aspects of spoliation to expand its scope:⁶

1. **Endean v Canadian Red Cross Society**, 1998 CanLII 6489 (BCCA) at para 32: the remedy aspect of spoliation is flexible and able to compensate for “any loss [the plaintiff] may have suffered **by reason** of the destruction of any evidence” [emphasis in original].
2. **Doust v Schatz**, 2002 SKCA 129 at para 29: found that the trial judge can consider spoliation “when considering matters of reliability, credibility and costs”.

These cases have not been widely adopted by other provinces.

[302] The intentional destruction of evidence does not found an intentional tort, nor is there a duty to preserve evidence in the tort of negligence: **McDougall** at para 29. The “unintentional destruction of evidence” may also give rise to a remedy but cannot be founded on the principle of spoliation: **McDougall** at para 25. The *Alberta Rules of Court*, Alta Reg 124/2010 and the Court’s “inherent ability to prevent abuse of process[es]” serve to provide remedies for such situations: **McDougall** at para 29.

[303] The doctrine of spoliation is an evidentiary rule. The party alleging the spoliation must establish the elements of spoliation on a balance of probabilities. As the Alberta Court of Appeal found in **McDougall** at paras 18 and 29, the party seeking to prove spoliation must prove:

- i. Legal proceedings existed, were pending or were reasonably anticipated when the evidence was destroyed;
- ii. The evidence destroyed was relevant to the litigation; and
- iii. The evidence was intentionally destroyed by the party.

See also: **Stamatopoulos v The Regional Municipality of Durham**, 2019 ONSC 603 at para 606.

[304] Other Canadian Courts have interpreted the doctrine to have four elements:

- (1) the missing evidence is relevant;
- (2) missing evidence was destroyed intentionally;
- (3) at the time of destruction, litigation was on-going or contemplated; and
- (4) it must be reasonable to infer that evidence was destroyed in order to affect the outcome of the litigation.

⁶ As there has been a shift towards individuals predominately using electronic documents, the destruction of electronic documents has equal weight in the consideration of spoliation: **Commonwealth Marketing Group v Manitoba Securities Commission**, 2009 MBQB 319.

Catalyst Capital Group Inc v Moyse, 2016 ONSC 5271 at para 136. See also: *Ayangma v FLSB & ELSB*, 2021 PECA 13 at para 25, *CMT v Government of PEI*, 2020 PECA 12 at paras 37 and 44.

However, tests used throughout Canada all encompass the definition of spoliation as found by the SCC in *St Louis*.

[305] The trial judge determines if spoliation has occurred and, if so, what remedy should be awarded: *McDougall* at para 29. The trial judge hears the entirety of the evidence and is accordingly best positioned to determine whether a party intentionally destroyed or altered evidence for the purposes of affecting pending litigation.

[306] Remedies for spoliation can include: (1) an adverse inference (though in Canadian law the rebuttable presumption exists as an adverse inference); (2) striking out a statement of claim or defense; (3) exclusion of evidence; or (4) a costs or monetary award: Christian at 913 referencing *Western Tank & Lining Ltd v Skrobutan*, 2006 MBQB 205 at paras 21–23; *Dreco Energy Services Ltd v Wenzel*, 2006 ABQB 356 at para 52. The nature of the remedy will depend on the context of the spoliation, such as if the spoliation was done in bad faith, and how egregious the behavior of the spoliator was: *iTrade Finance Inc v Webworx Inc*, 2005 CanLII 9196 (ONSC).

The Law: Duty to Mitigate

[307] Generally, a plaintiff cannot recover losses that could have been reasonably avoided: *Asamera Oil Corp v Sea Oil & General Corp*, [1979] 1 SCR 633 at 660. The Plaintiff in a civil proceeding has the onus to show they suffered a loss and quantify the amount of that loss. Mitigation serves to reduce the quantum of damages in contract and tort actions.

[308] Mitigation seeks to ensure that the wrongdoer is “not abused” when compensating the victim for their loss: *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 at para 25 [*Southcott*], citing *Redpath Industries Ltd v Cisco (The)*, [1994] 2 FC 279 at 302. See also *Janiak v Ippolito*, [1985] 1 SCR 146 at 163-164 [*Janiak*]. As the SCC found in *Janiak*, the Plaintiff is not required to take extraordinary measures to mitigate, however if any part of the damages is caused by the Plaintiff’s own negligence, they cannot seek to recoup those damages from the wrongdoer. See also *Costello v Calgary (City)*, 1997 ABCA 281 at para 42.

[309] Mitigation is based on “fairness and common sense”: *Southcott* at para 25. Plaintiffs need only to take reasonable steps to mitigate: *Janiak* at 163-164; *Armbruster v Nutting*, 2024 ABKB 36 at para 225; *Pfob v Bakalik*, 2004 ABCA 278 at para 17 [*Pfob*]. In the process of mitigation, all costs and expenses the plaintiff incurs in taking reasonable steps are recoverable: *Southcott* at para 25. Therefore, if a plaintiff does not take reasonable steps to mitigate, which later results in additional damages, the plaintiff may not be able to recover the full amount of damages suffered.

[310] If the situation requires, the plaintiff may need to retain professionals for purposes of mitigation: *Mason v Thompson*, 2020 ABQB 76 at para 68 [*Mason*]; *Warner v Calgary Regional Health Authority (Rockyview General Hospital)*, 2020 ABQB 172 at para 101; *Williams v Rosenstock*, 2020 ABQB 303 at para 565. The requirement for professionals in the process of mitigation does not relieve the plaintiff from needing to take steps to mitigate.

[311] The burden is on the defendant to show, on a balance of probabilities, how the plaintiff could have reasonably mitigated their losses: *Mason* at para 64, citing *Janiak*. The common law doctrine of mitigation requires the defendant to prove that the plaintiff: (1) did not make reasonable efforts to mitigate their damages; and (2) the mitigation was possible: *Southcott* at para 24, citing *Red Deer College v Michaels*, [1976] 2 SCR 324. However, mitigation steps only need to be reasonable and therefore the plaintiff does not need to “incur great expense or inconvenience” in the attempt to reduce losses: *Malton v Attia*, 2021 ABQB 503 at para 49 citing *Costello v Calgary (City)*, 1997 ABCA 281 at paras 70, 72. Attempts to mitigate are taken into consideration as the Court should consider any “substantial possibility of failure” of mitigation: *Pfob* at para 18, citing *Janiak* at para 39. The plaintiff does not need to follow all professional advice in mitigation. As long as their actions are demonstrably reasonable, it can satisfy the duty to mitigate: *Southcott* at para 25.

[312] Canadian jurisprudence suggests that an insured still has a duty to mitigate losses, and while it was not the plaintiff’s insurance policy, there is still an overarching duty on plaintiffs to mitigate: *Hartford Fire Insurance Co v Benson & Hedges (Canada) Inc*, [1978] 2 SCR 1088.

Analysis

Spoliation

[313] I cannot find that there has been spoliation by the La Traces on the evidence here. The Structures are presently in dismal condition, but the evidence does not establish, on a balance of probabilities, that there was any intention to allow their deterioration in order to affect the litigation.

[314] The La Traces allege Mr. Warkentin failed to produce, destroyed, or altered his own notes with respect to the pending litigation. I cannot find sufficient evidence to support this proposition.

[315] It is reasonable to conclude that the parties were aware of the contentious circumstances post-move. However, there is insufficient evidence to persuade me, on a balance of probabilities, that any of the material allegedly altered or destroyed would have any relevance to the central issue in this case.

Duty To Mitigate

[316] WBM had the obligation to move the Structures onto the La Trace Property intact and undamaged (with exception to the pre-agreed alterations to the House). Mr. Warkentin testified that once insurance became involved, he was no longer actively involved in the La Trace matter.

[317] There are two accounts for the events that occurred after the move. Ms. La Trace alleges she asked Mr. Warkentin and WBM’s insurer, Aviva, to cover up the house – to seal it and protect it from the elements - but received no response. The La Traces chose to tarp up the roof themselves but did not appear to take any other steps to mitigate. The La Traces testified that they were hesitant to do more due to insurance involvement.

[318] The evidence shows that Mr. La Trace made half-hearted attempts to place tarping on the House. That is the extent of the mitigation efforts in evidence.

[319] The Structures were left exposed to the elements after the move. From Mr. Warkentin's testimony, the La Traces did not initially accept tarping assistance but later, through email, contacted WBM and Aviva seeking mitigation help.

[320] Ms. La Trace testified they spent countless hours over the last few years to "clean, cut grass, cleaned off snow, thrown out the dead birds, [and] cleaned out the feces and the blood." There is no evidence of attempting – in a meaningful way - to seal the Structures off to prevent water damage or prevent animal access. In fact, it is clear from Ms. La Trace's testimony there was further damage to the Structures, from the elements, after the move.

[321] There is no evidence that utilities were ever supplied to any of the Structures. There is no evidence of any attempts to reattach fully the master bedroom to the House, to fully seal the cut.

[322] The La Traces installed windows and new roof shingles to the Gazebo after the move but did not put in installation, drywall, or reattach the bricks. Ms. La Trace stated that they did the "repairs that [they] intended on doing but not what [WBM] did to the walls."

[323] The La Trace House remains on the La Trace Property where Ms. La Trace has testified it is a "write-off" and an "eyesore".

[324] It is an accepted fact that the La Trace House, prior to the move, had broken windows and vandalism. It is also undisputed that after the move, the La Trace House needed repairs, had to be placed on its foundation, reconnected due to cuts, as well as other repairs.

[325] The La Traces had a duty to mitigate once the La Trace House was moved onto their property.

[326] The onus here is on the Defendant to show on a balance of probabilities that the La Traces did not take reasonable steps to mitigate their damages.

[327] I find on a balance of probabilities that the La Traces failed to take adequate steps to protect the Structures from the elements after the move, contributing to their condition and rendering repair more difficult. This failure to correct an obvious problem may have been deliberate (to bolster a case for the building of a new house) or simply careless. Either way, significantly more could have been done to protect the Structures than what is found in the evidence. Of course, this also affects the Court's ability to determine what damages were incurred when.

Lost Rental Income

[328] The La Traces' claim includes loss of rental income. They testified they intended to rent out the House for a period of time before moving into it themselves for retirement.

[329] The La Traces submit that the claim for lost rent is for the period of August 2016 until December 2023 and rent for one year lost for rebuilding of the Structures.

[330] Ms. La Trace provided Kijiji listings of homes located on acreages for rent as a reference for rental prices. Ms. La Trace created a Kijiji listing of the property to gauge potential interest and provided emails of individuals responding to her ad.

[331] WBM argued there is no loss of rental income. No evidence of a lease or tenant was produced.

[332] The claim for lost rental income is based on speculation. Even if the House had not struck a tree during the move, there were numerous repairs needed before the House would have been suitable for tenants. The rental plans are not, on the evidence, sufficiently clear and convincing to meet the onus on the Plaintiffs.

Conclusion on Damages

[333] I am not satisfied, on a balance of probabilities, that replacement – building a new house to replace the House – is the appropriate remedy.

[334] In the immediate aftermath of the move, the evidence shows, on a balance of probabilities, that the House – the costliest of the three Structures – could be repaired.

[335] I have earlier identified my impressions of the expert testimony and reports. In sum, I accept and rely on those experts who viewed the Structures close in time to the move.

[336] The evidence establishes, to the civil standard, that the damages suffered by the La Traces are most appropriately rooted in repair cost. Just prior to the House being damaged, it was a functional albeit imperfect dwelling place. The House hit the tree. It was damaged. In the immediate aftermath of the damage, the House was repairable. This is supported by the evidence, for example, Mr. Clarke's assessment: "[w]hen looking at the section of home that did not hit a tree the ceiling and walls have no cracks or separations at the corners."

[337] Mr. Clarke differentiated between the part of the House that hit the tree and the part that did not. Thus, the tree strike more likely than not caused the damage. The damage was exacerbated by the lack of action to repair or even to secure the House against the natural environment, responsibility for which rests more with the La Traces than any other party.

[338] The damages award must be based on what it would have cost to restore the Structures to their pre-move condition.

[339] The value of the Structures prior to the move is relevant if replacement, that is, the building of new Structures to replace the ones that were moved by WBM, is the appropriate measure of damages. I cannot accept that the House had no value. A finding that the Structures were only worth \$5,000 (or \$0 per the Bowker Report) is not legally plausible. Whatever the La Traces paid for the Structures, the Structures were damaged and thus *put into a different condition* as a result of WBM's breach of contract or negligence. Therefore, the goal is to put the House into its pre-breach condition, and this could be accomplished by repairing it.

[340] A claim for a new House is not tenable. The House was not new. It was not demolished. It was capable of being repaired and this was the finding in the immediate aftermath of the move by Mr. Clarke, who examined the House shortly after the move. The earliest inspections were conducted by Mr. Rahman with MR Engineering and Mr. Clarke with Pario. Mr. Rahman and Mr. Clarke both reached conclusions that repair was feasible. Mr. Clarke visited the site three times. Following his site review October 12, 2021, he noted: "it remains my opinion the home is repairable." In his report, Mr. Rahman listed a number of recommended repairs and supports for the House, and noted that, provided those occurred, "[t]he overall condition of the structural

components of the house is acceptable.” Even by the time employees of Stantec visited the site in November and December 2016, which was still earlier than many other experts, the distinction between damage caused by the move, and damage caused by exposure to the elements, were difficult to untangle. Had the repairs commenced immediately, the La Traces would have been put back in their pre-move position.

[341] To conclude on damages, I find that it is more likely than not that the House could have been repaired when it arrived, damaged, at the La Trace Property. The best evidence – that is, the evidence of reparability closest in time to when the damage was incurred – comes from the MR Engineering report and Mr. Clarke’s reports. Mr. Clarke’s first report was initially completed February 17, 2016, just a few weeks after the move.

[342] In terms of quantum, I accept the repair costs set out in Mr. Clarke’s report as the proper measure of damages suffered by the La Traces: \$211,457.43.

X. Adverse Inferences

Background

[343] The La Traces ask the Court to draw adverse inferences arising from WBM’s failure to produce documents it had undertaken to provide and in relation to refused undertakings, all from the Questioning of Mr. Warkentin.

[344] Counsel for WBM insisted during the trial that not all undertakings were accepted, and all relevant materials were produced to the La Traces (Trial Transcript September 15, 2022, at pages 85 – 88).

[345] By way of background, Justice Lema, the Case Management Justice, advised the La Traces, via email, that the trial judge would determine and draw any adverse inferences in relation to non-production – alleged or established - of any documents. Justice Lema further stated that the consequences of any failure to answer undertakings given at Questioning would be determined at Trial.

[346] This resulted in a multi-day hearing after the Trial, in which I considered the La Traces’ request for a number of adverse inferences to be drawn against WBM, in relation to WBM’s alleged unanswered or inadequate undertaking responses.

Adverse Inferences Generally

[347] Adverse inferences arise in cases where the essential litigation characteristic of candour, usually exemplified by disclosure of relevant information such as documents, has been compromised, ignored, or otherwise unobserved.

[348] Courts have numerous tools to deal with non-disclosure, including but not limited to exercising a discretion to draw an adverse inference against non-disclosing parties: *Esfahani v Samimi*, 2022 ABKB 795 at para 137 [*Esfahani*]; *Heuft v Bramwell*, 2021 ABQB 642 at paras 48 and 52; *Poursadeghian v Hashemi-Dahaj*, 2010 BCCA 453 at paras 22-25; *Blatherwick v Blatherwick*, 2015 ONSC 2606; *Wolf v Wolf*, 2019 ABQB 200 at para 52; *Stockall v Stockall*, 2020 ABQB 229 at para 53.

[349] The Court’s discretionary power to draw an adverse inference against a party who has failed to produce derives from the case of **Blatch v Archer** (1774), 1 Cowp 63, 98 ER 969 (KB) [**Blatch**]. Lord Mansfield in **Blatch** stated “[i]t is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted”. This principle has been repeatedly adopted by the Supreme Court of Canada: **Snell v Farrell**, [1990] 2 SCR 311 [**Snell**], **R v Jolivet**, 2000 SCC 29 [**Jolivet**], **Clements**, and **Benhaim v St-Germain**, 2016 SCC 48 [**Benhaim**].

[350] Whether an inference should be drawn in a particular case falls within the discretion of the trier of fact, to be determined with reference to all of the evidence: **Esfahani** at para 145. As Sopinka J stated in **Snell** at page 330 “[w]hether an inference is or is not drawn is a matter of weighing evidence.”

[351] Following the approach in **Snell**, the Court in **Benhaim** at para 44, found that the decision to draw “an adverse inference must be based on an evaluation of all the evidence.” As well, the Court should look to the whole of a party’s conduct throughout the matter before determining whether or not to draw an adverse inference: **Pfeifer v Westfair Foods Ltd**, 2004 ABCA 422 [**Pfeifer**].

[352] When evidence is not produced, there is a risk to the party not producing the evidence that the trier of fact may draw a negative conclusion from the failure.

[353] The discretion to draw an adverse inference is a question of fact and owed deference on appeal: **Benhaim**; **Baker v Weyerhaeuser Company Limited**, 2022 ABCA 83 at para 36.

[354] Whether or not the documentation requested is relevant and material to the issues being litigated is an important factor in considering whether to draw an adverse inference: **Esfahani** at para 148.

[355] When relevant and material evidence is not produced the absence of an explanation for the non-production is a basis for the Court to draw an adverse inference. The Court must be precise about the “exact nature” of the adverse inference to be drawn: **Jolivet** at para 28.

[356] The party requesting an adverse inference against another party must present some evidence to support the inference sought: **Alavinejad v Farimani**, [1991] BCJ No 3936. See also: **Dandeneau v Dandeneau**, 2000 ABQB 959 at para 11; **656621 BC Ltd v David Moerman Painting Ltd**, 2022 BCSC 1683. An adverse inference can only be drawn if a “*prima facie* case has been established by the party bearing the burden of proof”: Sopinka, Lederman & Bryant - *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada, 2022) at §6.511.

[357] If a party alleges the documents requested do not exist, this alone does not give reason to draw an adverse inference. The “whole of the [party’s] conduct” should be considered when a party alleges the evidence requested does not exist: **Pfeifer** at para 46. Tribunals have considered the absence of evidence and subsequent obtainment of the non-existent evidence to be a basis for an adverse inference to be drawn: **Carpenters’ District Council of Ontario, United Brotherhood of Carpenters and Joiners of America v Inex Painting & Flooring Inc**, 2023 CanLII 95898 (ON LRB).

Adverse Inferences in Relation to Questioning and Undertakings

[358] As mentioned, adverse inferences can also be drawn when a party fails to answer undertakings given at Questioning. Adverse inferences can be made when documents promised on undertakings are not produced; however, only when the entirety of the context is considered.

[359] In *Alberta (Minister of Justice and Solicitor General) v Temori*, 2018 ABQB 125, the Court declined to draw an adverse inference when financial statements were not provided as the adverse inference would not have been relevant to the issue nor were the financial statements in question highly probative.

[360] Courts have found that not all failures to answer an undertaking will “support an adverse inference or costs at trial”: *Abt Estate v Ryan*, 2020 ABCA 133 at para 42 [*Abt*]. After accepting an undertaking, there are a variety of scenarios that could arise that obviate the need for an answer. The Court in *Abt* recognized, at para 42, that the answer could be in other provided documents, or the requested evidence could be irrelevant and immaterial. If the evidence is relevant and material, the party requesting the undertaking may obtain an order for production of the documents requested.

[361] As the Court found in *Abt*, the party requesting an undertaking can seek to enforce that undertaking but failure to seek enforcement is an acknowledgment that the answer was not needed.

[362] An adverse inference for failure to comply with an undertaking may not be necessary if the case can be decided without the evidence at trial: *Nolt-Leverton v Leverton*, 2023 ABKB 318 [*Nolt-Leverton*]. In that case, the Court found that the “case may be decided on the record, on the evidence and the absence of evidence, in light of the burdens of proof”: at para 119. In considering whether to draw an adverse inference, the Court should do so with regard to the entirety of the case to determine whether an adverse inference is necessary.

Adverse Inferences in this Case

[363] From the La Traces’ perspective, WBM’s failure to produce “sketchbooks, notebooks, work diaries/calendars” with information about dates, times, and so forth is highly relevant. I did not order production of this material during the trial.

[364] The issue in this trial is how to calculate damages for breach of contract and negligence. WBM admitted that it caused damage when the tree strike occurred. This damage sounds in contract and in tort. The information that the La Traces request is not in fact directly relevant to (a) the fact that the House hit a tree; and (b) whether the House should be repaired or replaced. On the whole of the evidence, it is unlikely that this information would have probative value with respect to the issues at trial.

[365] Whether or not an adverse inference should be drawn from Mr. Warkentin’s failure to produce documents he had undertaken to provide is at the discretion of the trial judge and largely turns on whether or not the documents requested are relevant and material, and on Mr. Warkentin’s explanation for failing to produce those documents.

[366] The La Traces bear the onus here. The standard of proof is balance of probabilities. They seek adverse inferences in relation to:

- (a) Photos provided to Davey Tree, with metadata;
- (b) Portions of Mr. Warkentin's diary that the La Traces argue would show that Mr. Warkentin was out of the country at key times, that other work was not postponed in favour of their job and that WBM was doing other work between November 2015 and November 2016;
- (c) Some information about road use permits, failure to ask the authorities for permission to move the House in one piece, lack of permit to remove trees;
- (d) WBM financial information, related to other jobs;
- (e) Dates that Mr. Warkentin was outside of Alberta in 2015 through 2017.

[367] While some of this information might have served the La Traces as proof (to them) of Mr. Warkentin's attitude, or his bad dealings with them, or his negative intentions, the decision in this case can be made without this evidence. I also note that for refused undertakings, or those that are not answered to the La Traces' satisfaction, no application was brought to enforce answers before trial.

[368] Specifically, I find that the undertakings that concerned the La Traces were either (a) irrelevant; (b) impossible to answer; or (c) rightfully refused.

[369] On the whole of the evidence, given the actual issues and the entirety of the evidence, it is more likely than not that the absence of this material has no material effect on the determination of the issues at trial.

[370] Therefore, I exercise my discretion to reject the La Traces' application to have adverse inferences drawn against WBM

XI. CPA Claim

[371] The La Traces argue that WBM, through Mr. Warkentin, engaged in unfair business practises.

[372] Section 13 of the *CPA* sets out the range of remedies available to the Court where a consumer has "suffered damage or loss due to an unfair practice" (*CPA*, s 13(1)(b)) and gives a right of action against, *inter alia*, the principal of a supplier. The *CPA*'s purpose is outlined, in broad terms, in its preamble, which reads:

WHEREAS all consumers have the right to be safe from unfair business practices, the right to be properly informed about products and transactions, and the right to reasonable access to redress when they have been harmed;

WHEREAS businesses thrive when a balanced marketplace is promoted and when consumers have confidence that they will be treated fairly and ethically by members of an industry;

WHEREAS businesses that comply with legal rules should not be disadvantaged by competing against those that do not; and

WHEREAS the Government of Alberta is committed to protecting consumers and businesses from unfair practices to support a prosperous and vibrant economy...

[373] The question of substantive application of the *CPA* to the commercial relationship between the La Traces and WBM has already been litigated.

[374] Justice Lema of this Court held in ***La Trace v Warkentin Building Movers Virden Inc***, 2021 ABQB 297 that the *CPA* applied to WBM; “residential-house moving” falls into the definition of “services” as defined in the *CPA*. WBM had argued that the La Traces had not intended to use the House for residential purposes but instead for revenue generating purposes. The Court found that the intention was not relevant to the application of the *CPA*.

[375] WBM appealed Justice Lema’s decision, arguing that a breach of procedural fairness had occurred, and that the *CPA* had been misinterpreted. The appeal was dismissed in ***Warkentin Building Movers Virden Inc v La Trace***, 2021 ABCA 333. The Court of Appeal held that the *CPA* applies to the transaction between the La Traces and WBM. The Court held that a residential home is primarily used for personal purposes. Even if they were to consider the La Traces’ intention, which was to rent out the home until they retired, this does not create a commercial purpose for the home as the La Traces ultimately would live in the home after retirement.

[376] The *CPA* applies to the transaction *qua* transaction. Therefore, this aspect of the La Traces’ claim – an action by a consumer under s 13 of the Act - must be addressed.

[377] The *CPA* mandates that the Director of Fair Trading must be served with a copy of the Statement of Claim in a section 13 action. No steps can be taken in the action until service has been effected. The Director can then apply to the Court to be added as a party to the action. (*CPA*, s 18)

[378] Service of the Statement of Claim on the Director is mandatory. The word “must” is used in that section. When the word “must” is used in connection with a statutory obligation, a mandatory requirement is indicated, similar to the use of “shall” by legislation drafters. It has been held that the use of “must” in fact “entails a more mandatory obligation admitting of less discretion in the court” than “shall”. In ***UAW, Local 458 v Massey-Ferguson Industries Ltd***, 1979 CanLII 1802, the Ontario Division Court held (at paras 11, 16):

The word "must" is a common imperative. It is hard to think of a commoner. There is no dictionary of stature of which I am aware that accords to the word any other connotation. In its present or future tense it expresses command, obligation, duty, necessity and inevitability...

... ..

Since "must" bears only one meaning, an imperative one, it is inappropriate and unnecessary to search in the context for something that strengthens it.

[379] If the Legislature, in passing the *CPA*, had wanted to *encourage* service on the Director, or make it a *matter of choice*, another word or phrase would have been used, such as “should” or “may”. The Legislature chose the word “must”.

[380] The La Traces have asked that the notice requirement be waived, and that the *CPA* be read as a whole, purposively and contextually, in the interests of justice.

[381] There is no evidence that the Director was ever served. Ms. La Trace testified that she did not provide the Director with the Statement of Claim. She testified that she spoke with an

individual named Scott Hood, the Director of Fair Trading, just before November 20, 2020, when Ms. La Trace found out about the rules concerning deposits. However, this does not constitute service on the Director.

[382] Accordingly, steps taken in the *CPA* action absent such service must fail, including the *CPA* claim at trial. When the Court of Appeal held that the *CPA* applies to this transactional arrangement, that *ipso facto* means that the section 18 notice requirement also applies.

[383] The *CPA* claim is dismissed.

XII. WBM's Claim

[384] WBM claims the unpaid balance of the contract price (\$39,000), damages for lost use of equipment (\$109,800), and payment of a bill owed to CN Rail that was incurred as part of the move (\$4,410). WBM also seeks interest at 24% or interest pursuant to the *Judgment Interest Act*, RSA 2000, c J-1 and costs.

[385] For the reasons that follow, WBM is granted judgment against the La Traces in the sum of \$39,000 plus GST and \$4,410, plus interest under the *Judgment Interest Act*, and costs as specified below.

A. Unpaid Balance of the Contract Price

[386] The contract price is not in dispute. The La Traces agreed to pay WBM \$80,000 to move the Structures. The Structures were moved.

[387] At trial, Ms. La Trace testified that the La Traces paid WBM \$42,000. Looking at the evidence, it appears the amount paid was \$41,000. There is a balance owing of \$39,000. The La Traces stated they “would not pay [WBM]” any additional amounts.

[388] The La Traces owe WBM \$39,000 plus GST under the contract, and judgment in WBM's favour will follow in that amount.

B. Lost Use of Equipment & Opportunity

[389] WBM claims the cost of renting equipment that the La Traces would not allow WBM to remove from the La Trace Property, such as an equipment rental fee. At Questioning, Mr. Warkentin quantified this as \$450 per day. Tied into the rental claim is a damages claim based on lost opportunity to bid on jobs because the equipment was unavailable to WBM.

[390] There is a lack of evidence to establish damages based on lost jobs, inability to bid on jobs, and other economic losses of this sort.

[391] Loss of opportunity is a legal principle that allows parties to claim damages arising from a breach of contract or a wrongful act. In *Folland v Reardon*, 2005 CanLII 1403 (ONCA) the Ontario Court of Appeal set out criteria a plaintiff must establish to receive damages for a lost opportunity. At para 73:

...First, the plaintiff must establish on the balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss. Second, the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation. Third, the plaintiff must demonstrate that the outcome, that is, whether the plaintiff would have avoided the loss or made the gain depended on someone or something other than the

plaintiff himself or herself. Fourth, the plaintiff must show that the lost chance had some practical value... [Citations omitted.]

[392] The Court stated in *Pacific Destination Properties Inc v Granville West Capital Corp*, 1999 BCCA 115 at para 54:

In assessing damages for loss of opportunity the court must reach a conclusion as to what would have taken place had there been no breach. If it is shown with some degree of certainty that a specific contract was lost as a result of the defendant's breach, some damages should be awarded. Even though the plaintiff may not be able to prove with certainty that it would have obtained specific results but for the breach, it may be able to establish that the defendant's breach deprived it of the opportunity to obtain such business. See: *Houweling Nurseries Ltd v Fisons Western Corporation* (1988), 1988 CanLII 186 (BC CA), 37 BCLR (2d) 2 (CA).

[393] In *CM Callow Inc v Zollinger*, 2020 SCC 45, the Supreme Court of Canada found that where a party breaches the duty of honesty, they may be responsible for damages for loss of opportunity. In that case, the plaintiff provided evidence of opportunities to bid on other job offers which he did not pursue due to the defendant's dishonesty.

[394] Similarly, in *Four Top Hospitality Group Ltd v Olde Towne Developments Ltd*, 2024 BCSC 2279, the Plaintiff provided an expert appraisal report as evidence for loss of opportunity to sublease their premises.

[395] WBM must prove that it suffered these damages on a balance of probabilities. There is no evidence establishing that the La Traces were aware they would be charged a rental fee or otherwise agreed to it. There is no documentation to support the claim except WBM invoices sent to the La Traces for equipment rental. Mr. Warkentin admitted at Questioning that WBM did not rent alternative equipment when it was unable to access its equipment that was on the La Trace Property.

[396] This claim is not made out on the evidence. WBM's claim for lost use of equipment is dismissed.

C. The CN Rail Bill

[397] WBM paid CN Rail \$4,410. This amount was directly related to the move and is a third party cost that had to be paid. WBM paid this amount on behalf of the La Traces. The La Traces have not reimbursed WBM for this amount.

[398] Thus, \$4,410 is owing to WBM by the La Traces.

[399] The La Traces made a very significant issue out of WBM depositing a cheque made out to CN Rail.

[400] This has no impact on my finding that WBM is out of pocket the sum of \$4,410, paid to CN Rail, for the benefit of the La Traces.

[401] This claim is allowed and WBM will have judgment against the La Traces in the amount of \$4,410.

D. Other Third Party Costs

[402] It was a term of the contract between the parties that the La Traces would pay third party costs incidental to the move. WBM paid these costs in the first instance.

[403] These costs include Fortis (high load escort), Davey Tree (tree removal on the route), CN Rail (line lift), and Carillion (Shaw, Telus).

[404] The La Traces' claim seems to be that these costs were hidden from them, were excessive, and do not form part of the contract price. At Questioning, Mr. Warkentin admitted that "[w]e didn't specifically talk about a numerous number of things" in the context of trees and other costs.

[405] The January 11, 2016 email exchange represents a clear indication that these incidental costs were still accruing. There would have been no surprise. In fact, as early as January 11, 2016, Mr. La Trace was weighing his options. The Fortis quote, which is specifically mentioned in the invoice, was higher than expected, and he stated that "[i]f the remaining ones come in at similar values, the house isn't worth moving". It is clear that further third-party costs were contemplated. The move proceeded. The costs were incurred by WBM solely to benefit the La Traces.

[406] The Quote referred to third party costs. These were discussed early in the relationship between WBM and the La Traces. While Ms. La Trace denied that this email exchange was an indication of possible cancellation, the La Traces were – quite sensibly – engaged in some sort of cost/benefit analysis as the expenses emerged.

[407] It is also noteworthy that Mr. La Trace signed the January 24, 2016, quote-type document which states "[c]ustomer agrees to pay all Bills as agreed on as bills come in – utility, structures, trees". This is evidence of his knowledge and acceptance of these costs.

[408] Therefore, WBM has proven, on a balance of probabilities, that these third-party costs are part of the contract and thus the La Traces are responsible for them.

[409] With the exception of the amount paid by WBM to CN Rail, mentioned above, all other third party costs were paid by the La Traces.

D. Contractual Interest Claim

[410] The Quote and subsequent documents in the same form provide that interest will accrue on all amounts owing at a rate of 24%.

[411] This Court found in *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2015 ABQB 649 [*Precision Drilling*] at paras 23-24, that an 18% contractual interest rate was valid:

My observation is this: an agreed upon interest rate for payments in arrears saves both litigants' time and the courts' time. Otherwise, it would be necessary for an unpaid goods or services supplier, when suing for non-payment, to adduce evidence as to things such as its average return on capital and its blended average cost of borrowing. These figures would be constantly changing.

While there is no doubt that an agreed upon interest rate of 18% contains an element of 'incentive' in addition to an element of compensation, I find nothing

extravagant or unconscionable about a goods or service provider charging 18% interest if they are not paid on time for goods or services provided...

[412] The Alberta Court of Appeal in ***Bidell Equipment LP v Caliber Midstream GP LLC***, 2020 ABCA 478, aff'g 2019 ABQB 296 [***Bidell***], affirmed the approach in ***Precision Drilling***. In ***Bidell***, the contractual interest rate for unpaid invoices was 24%. The Court found that to be enforceable, and noted the following at paras 48-49:

The parties contracted to an interest rate of 24% per annum. Caliber could have elected to make a payment towards invoices rendered at any time. It was neither vulnerable nor a victim of oppression. It has made no payments at all. Caliber's claim that Bidell got an undeserved windfall through the accumulation of the interest since cancellation of the contract falls away when one notes that had Caliber paid the indisputable charges under the contract, the interest buildup would have been a fraction of what it was. As a result, Bidell has effectively financed the entirety of its outlays since termination of the contract on January 23, 2015. Even a contractually agreed upon high interest rate is enforceable and a creditor is entitled to judgment in accordance with the terms of the contract: *Industrial Acceptance Corp v Beaupre*, 1956 CanLII 603 (AB CA), [1956] CanLII 603, 18 WWR (ns) 685, 686-687 (ABCA). This is particularly so with sophisticated commercial actors.

We do not find the interest rate as stated to be a penalty nor contractually unenforceable as punitive, exorbitant or unconscionable. We do not interfere with the considered and reasonable decision of the trial judge on this point.

[413] The Quote documents, which contain significant contractual terms related to cost, have the interest rate specified on them. However, these were not sophisticated commercial actors. The La Traces never signed one of the Quotes. The parties put the Court in a position where it had to determine contractual terms from various sources rather than a written document or documents. This affair, from a contract law and commercial perspective, was managed with sloppiness and a lack of attention by all parties. I do not have sufficient evidence of *consensus ad idem* on interest on overdue amounts.

[414] Therefore, I decline to grant WBM interest on amounts owing at what it proffers as the contractual rate.

[415] WBM will have interest on unpaid amounts pursuant to the *Judgment Interest Act* from March 1, 2015, to the date of this Decision.

XIII. Judgment

A. Damages: Contract and Tort

[416] The La Traces will have judgment against WBM in the sum of \$211,457.43, based on Mr. Clarke's evidence at trial. This represents the repair costs required as a result of the tree strike, which is, on a balance of probabilities, the appropriate basis for damages given that in the immediate aftermath of the move, the Structures were reparable. That figure is based on repair contemporaneous with the damages being incurred and includes depreciation. I have included the depreciation amount as, I find, based on the age and condition of the House, I must account for betterment the La Traces would have enjoyed if repairs had been undertaken. I have accepted

WBM's argument that the date of loss is the appropriate time to calculate damages; pre-judgment interest will account for the passage of time.

[417] In other words, the Structures could have been restored to their pre-move state had the La Traces chosen to do so. They did not. This applies to contract damages and tort damages. The measure of damages under either prong is the same: restore the La Traces to the position that they were in prior to the move.

[418] I am not making a reduction for failure to mitigate given the date on which Mr. Clarke's figure is based.

[419] The La Traces will have interest on the amount of their judgment calculated pursuant to the *Judgment Interest Act* from March 1, 2015, to the date of this Decision.

[420] WBM will have judgment against the La Traces of \$39,000 plus GST for the move balance owing under the contract and \$4,410 for third party costs. WBM will have interest on this judgment pursuant to the *Judgment Interest Act* from March 1, 2015, to the date of this Decision.

B. Costs

[421] The following costs awards were made during the course of the trial:

- a) \$500 is owed to WBM by the La Traces in any event of the cause due to the La Traces' unsuccessful application during trial regarding the attendance of WBM's expert, Verlin Koch, at the La Trace Property to conduct an updated inspection of the Structures.
- b) \$2,500 in costs is owed to the La Traces by WBM due to late disclosure of Greg Bowker's expert report.
- c) \$3,000 in costs is owed to WBM by the La Traces resulting from their dismissed application to call rebuttal evidence on the issue of foundation and demolition and sequencing and their application to recall Mr. Clarke as an expert and have him provide an earlier report which either does not exist or is privileged.

[422] Thus, the net amount of costs owing prior to any assessment of the costs of the action is \$1000, which is due and owing to WBM.

[423] In terms of the outcome of this action, and subject to the paragraph immediately following this one, the parties will each have their costs of their respective claims based on the column reflected in their initiating pleadings (as amended), both under Schedule "C" to the *Alberta Rules of Court*.

[424] The La Traces will only receive Schedule "C" costs for those steps that were taken with a lawyer actually present, in the Courtroom, at Questioning or other steps actually performed by a lawyer. They will not have costs for any other steps taken where a lawyer was not actually present.

[425] If the parties are unable to agree on costs, they may submit a letter to me by no later than August 15, 2025 through my Judicial Assistant, no more than 5 pages long, single-sided paper, 12 point font, double spaced, plus case authorities or relevant pleadings.

Heard on November 1, 2, 3, 4, 5, 8, 9 and 10, 2021; September 12, 13, 14, 15, 16, 19, 20, 21, 22 and 23, 2022; January 23, 2023;

Argument concerning read-ins heard February 9, 2023.

Written Argument filed October 18, November 25 and December 18, 2023

Final Argument heard January 24th through 26th, 2024.

Dated at the City of Edmonton, Alberta this 7th day of July, 2025.

S.N. Mandziuk
J.C.K.B.A.

Appearances:

Dean La Trace and Darlene La Trace

Self-Represented Litigants with limited retainer of Gary Zimmerman, McLennan Ross, LLP.

Ted Lawson and Megan Riddell

Parlee McLaws

for WBM

TAB 18

Liberty Oil & Gas Ltd.(Companies' Creditors Arrangement Act) 2002 ABQB 949

Date: 20021028

Action No. 0201-03299

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

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

AND IN THE MATTER OF LIBERTY OIL & GAS LTD.
AND 3860337 CANADA LTD.

Action No. 0201-090057

IN THE MATTER OF SECTION 192 OF THE CANADA BUSINESS CORPORATIONS
ACT, R.S.C. 1985, C. C-44, AS AMENDED;

AND IN THE MATTER OF AN ARRANGEMENT INVOLVING LEXXOR ACQUISITION
COMPANY LTD., LEXXOR ENERGY INC., LIBERTY OIL & GAS LTD. AND THEIR
RESPECTIVE SHAREHOLDERS

Defendant

REASONS FOR DECISION
of the
HONOURABLE MR. JUSTICE DENNIS G. HART

APPEARANCES:

Mr. Josef G.A. Kruger
Borden Ladner Gervais
For the Applicants

Mr. Larry B. Robinson and
Mr. Michael D. Aasen
Miller Thomson LLP
For Lexxor Acquisition
Company Ltd. and Lexxor Energy Inc.

Mr. Frances Dearlove
Bennett Jones LLP
For Richter, Allan & Taylor

Mr. Peter S. Jull, Q.C.
Gowling Lafleur Henderson LLP

Mr. B.A.R. Smith, Q.C. and
Mr. David LeGeyt
Fraser Milner Casgrain LLP
For Liberty Oil & Gas Ltd.

Mr. Geoffrey D. Baker
Carscallen Lockwood LLP
For Rick Martin

Mr. G. Brian Davison
Davison Worden Sloan LLP

[1] The issue raised on this application is whether or not the stay granted in my order of June 28, 2002 was too broad vis-a-vis directors by reason of the failure to expressly limit it in accordance with section 5.1(2)(b) of the *Companies Creditors Arrangement Act*.

[2] Section 5.1 was added to the *Act* in 1997. Before the enactment of this section, the legislation provided for compromises of claims only against the petitioning company. The new section extends relief to certain claims against directors of the petitioning company.

[3] The section reads as follows:

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c.12, s. 122.

[4] In the case at bar, a draft Statement of Claim has been placed before the court wherein the prospective Plaintiffs, two shareholders of the petitioning company, claim financial loss and damage caused by alleged reliance upon fraudulent or negligent misrepresentations as to the value of the shares of the company by the proposed Defendant, a director.

[5] While there may be room for argument as to whether the prospective Plaintiffs are “creditors” within the meaning of sub-section (b), it seems clear that the claims are based upon allegations of wrongful or oppressive conduct, to wit, fraudulent or intentional misrepresentation. On my reading of the section in the context of the *Act* as a whole, claims against directors based upon allegations of such conduct are not to be included in the compromise or arrangement, whether brought by a “creditor” or any other party. Parliament has clearly excluded them.

[6] It follows, therefore, that the order of June 28, 2002 should be amended to reflect the exclusion set out in Section 5.1(2) and I direct accordingly. A similar conclusion was reached by Paperny J. of this court (as she then was) in *Canadian Airlines Corps. (Re)* [2000] A.J. No. 771; 2000 A.B.Q.B. 442, Action No. 0001-05071 (para.90).

[7] It was argued by the Respondents that the Applicants should not be permitted to pursue their proposed action in any event. They take this position for a variety of reasons including an alleged failure to show that the claims are “*prima facie meritorious*”, a lack of jurisdiction in the court to set aside or vary the entered order and the Applicants’ filing of an appeal which allegedly makes the chambers judge “*functus*” with respect to the order appealed from.

[8] With respect, I am unable to agree with these positions. In my view, the appropriate test to apply to the draft pleading is the well-known “plain and obvious” test which is applied on applications to strike under rule 129. See *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959. On this test I find that the proposed Statement of Claim must be allowed to stand. It is trite to observe that the merits of the proposed action are not before the Court at this juncture. Similarly, I am not persuaded that I lack jurisdiction to deal with the June 28, 2002 order either because it deals with substantive rights and has been entered or because an appeal has been taken from some parts of the order.

[9] In the result, the Applicants' claims are allowed to proceed notwithstanding the stay against directors in the June 28 Order and counsel are directed to collaborate upon suitable changes in wording to amend that order to reflect the exclusion in Section 5.1(2) of the *Act*. In the event that consensus cannot be reached without delay, the matter can be brought back before me.

[10] If necessary, costs of this application may be spoken to.

HEARD on the 9th day of October, 2002.

DATED at Calgary, Alberta this 28th day of October, 2002.

J.C.Q.B.A.

TAB 19

Ville de Montréal *Appellant*

v.

Deloitte Restructuring Inc. *Respondent*

and

**Alaris Royalty Corp.,
Integrated Private Debt Fund V LP,
Thornhill Investments Inc.,
Ville de Laval and
Union des municipalités du Québec**
Intervenors

**INDEXED AS: MONTRÉAL (CITY) v. DELOITTE
RESTRUCTURING INC.**

2021 SCC 53

File No.: 39186.

2021: May 20; 2021: December 10.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté,
Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
QUEBEC

Bankruptcy and insolvency — Stay of creditors' rights and remedies — Claims that may be dealt with by compromise or arrangement — Compensation between debt arising before and debt arising after initial order — Quebec Voluntary Reimbursement Program — Whether claim arising from agreement entered into under Quebec Voluntary Reimbursement Program is necessarily claim that relates to debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d) of Companies' Creditors Arrangement Act — Whether supervising judge's discretion in restructuring context allows judge to stay right invoked by creditor to effect compensation between debt arising before and debt arising after initial order — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.02, 19(2)(d), 21 — Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR,

Ville de Montréal *Appelante*

c.

Restructuration Deloitte Inc. *Intimée*

et

**Alaris Royalty Corp.,
Integrated Private Debt Fund V LP,
Thornhill Investments Inc.,
Ville de Laval et
Union des municipalités du Québec**
Intervenantes

**RÉPERTORIÉ : MONTRÉAL (VILLE) c.
RESTRUCTURATION DELOITTE INC.**

2021 CSC 53

N° du greffe : 39186.

2021 : 20 mai; 2021 : 10 décembre.

Présents : Le juge en chef Wagner et les juges Moldaver,
Karakatsanis, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Suspension des droits et recours des créanciers — Réclamations considérées dans le cadre des transactions ou arrangements — Compensation entre une dette née avant et une dette née après l'ordonnance initiale — Programme québécois de remboursement volontaire — Une créance découlant d'une entente conclue dans le cadre du Programme québécois de remboursement volontaire constitue-t-elle nécessairement une réclamation se rapportant à une dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d) de la Loi sur les arrangements avec les créanciers des compagnies? — Le pouvoir discrétionnaire dont dispose le juge surveillant dans le contexte d'une restructuration lui permet-il de suspendre le droit d'opérer compensation entre une dette née avant et une dette née après l'émission d'une ordonnance initiale qu'invoque un créancier? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.02,

c. R-2.2.0.0.3 — Voluntary Reimbursement Program, CQLR, c. R-2.2.0.0.3, r. 1.

In August 2018, the Superior Court made an initial order by which SM Group, a consulting engineering firm, became subject to proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"). The order stayed the rights and remedies of creditors, among other things, and appointed a monitor. Following that order, SM Group continued to perform work for Ville de Montréal ("City"). However, the City refused to pay for that work and invoked its right to effect compensation between what it owed SM Group and two claims it allegedly had against SM Group that arose before the initial order. Those claims are related to the application of the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts* ("Bill 26") and, according to the City, result from fraud on SM Group's part. The first claim arises from a settlement agreement entered into under the Voluntary Reimbursement Program ("VRP") that resulted from Bill 26 ("VRP claim"). The second claim is based on a proceeding brought by the City against SM Group, in which it claimed money from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract.

In response to the City's refusal to pay for the work done by SM Group after the initial order, the monitor applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group. The supervising judge granted the application. The Court of Appeal reached the same conclusion as the supervising judge: that the compensation invoked by the City could not be effected. It found that a claim relating to fraud falling within s. 19(2)(d) of the CCAA is not an exception to the rule stated in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, whereby compensation between debts arising before and after an initial order ("pre-post compensation") is prohibited. It was also of the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, the Court of Appeal agreed with the supervising judge that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

19(2)d), 21 — *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3 — *Programme de remboursement volontaire*, RLRQ, c. R-2.2.0.0.3, r. 1.

En août 2018, la Cour supérieure rend une ordonnance initiale assujettissant Groupe SM, une firme de génie-conseil, à des procédures déposées en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC »). L'ordonnance suspend notamment les droits et recours des créanciers et nomme un contrôleur. Postérieurement à cette ordonnance, Groupe SM continue à effectuer des travaux dont bénéficie la Ville de Montréal. La Ville refuse toutefois de payer ces travaux et invoque son droit d'opérer compensation entre ce qu'elle doit à Groupe SM et deux créances, nées avant l'ordonnance initiale, qu'elle prétend détenir contre celui-ci. Ces créances sont liées à l'application de la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics* (« Loi 26 ») et, selon la Ville, résulteraient de fraude de Groupe SM. La première créance découle d'une entente de règlement intervenue dans le cadre du Programme de remboursement volontaire (« PRV ») issu de la Loi 26 (« créance PRV »). La seconde créance est fondée sur un recours intenté par la Ville contre Groupe SM dans lequel elle lui réclame de l'argent au motif qu'il aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau.

En réponse au refus de la Ville de payer les travaux effectués par Groupe SM après l'émission de l'ordonnance initiale, le contrôleur demande un jugement déclaratoire portant que les sommes dues à Groupe SM par la Ville ne peuvent faire l'objet de compensation. La juge surveillante accueille la demande. À l'instar de cette dernière, la Cour d'appel conclut que la compensation invoquée par la Ville ne peut s'opérer. Elle estime qu'une créance relative à la fraude visée par l'al. 19(2)d) de la LACC ne constitue pas une exception à la règle énoncée dans l'arrêt *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, selon laquelle la compensation entre des dettes nées avant et après l'émission d'une ordonnance initiale (« compensation pré-post ») est interdite. Elle est également d'avis que la Ville n'a pas prouvé que ses créances sont visées par l'al. 19(2)d). Enfin, en ce qui concerne la créance relative au contrat des compteurs d'eau, la Cour d'appel, tout comme la juge surveillante, estime que les conditions de la compensation judiciaire ne sont pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration.

Held (Brown J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Martin JJ.: First, a claim arising from an agreement entered into under the VRP is not necessarily a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA. In this case, the City has not shown that the VRP claim relates to a debt resulting from fraud within the meaning of that provision. Second, with regard to pre-post compensation, a supervising judge has the discretion to stay the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law. However, the supervising judge may refuse to stay this right, or may lift such a stay, only in exceptional circumstances, given the high disruptive potential of this form of compensation. In the case at bar, the initial order stayed the City's right to pre-post compensation, and it would not be appropriate to lift the stay in relation to the claims in issue.

To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a "claim that relates to" a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" pursuant to s. 19(2)(d) of the CCAA.

The first step in characterizing the VRP claim is to distinguish, for the purposes of the CCAA, claims that are subject to a compromise or arrangement from those that are not. Section 19(2) provides, by way of exception, that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud. To prove that its claim relates to a debt resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d), a creditor has the burden of establishing, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service.

In this case, the City did not try to prove or even allege any of these elements. The content of the VRP agreement, Bill 26 and the regulation made under it ("VRP

Arrêt (le juge Brown est dissident) : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Côté, Rowe et Martin : Premièrement, une créance découlant d'une entente conclue dans le cadre du PRV n'est pas nécessairement une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la LACC. En l'occurrence, la Ville n'a pas démontré que la créance PRV se rapporte à une dette qui résulte de fraude au sens de cette disposition. Deuxièmement, en ce qui concerne la compensation pré-post, le juge surveillant possède le pouvoir discrétionnaire de suspendre l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law. Toutefois, le juge surveillant peut refuser de suspendre ou lever la suspension du droit à la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. En l'espèce, l'ordonnance initiale a suspendu le droit de la Ville à la compensation pré-post, et il n'est pas indiqué de lever cette suspension pour ce qui est des créances en litige.

Pour trancher la question relative à la compensation dans le contexte du présent pourvoi, la Cour doit d'abord déterminer si une créance découlant d'une entente conclue dans le cadre du PRV constitue nécessairement une « réclamation se rapportant à » une « dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits » aux termes de l'al. 19(2)d) de la LACC.

Pour qualifier la créance PRV, il faut d'abord distinguer, au sens de la LACC, les réclamations compromises par la transaction ou l'arrangement de celles qui ne le sont pas. Le paragraphe 19(2) prévoit exceptionnellement que certaines réclamations ne peuvent être compromises dans le cadre d'une transaction ou d'un arrangement, notamment celles découlant de fraude. Afin de démontrer que sa créance est une réclamation qui se rapporte à une dette résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d), le créancier intéressé a le fardeau d'établir, par prépondérance des probabilités, les quatre éléments suivants : (i) le débiteur lui a fait une représentation; (ii) cette représentation était fautive; (iii) le débiteur savait que la représentation était fautive; (iv) cette fautive représentation a été faite dans le but d'obtenir un bien ou un service.

En l'espèce, la Ville n'a pas cherché à prouver ni même à alléguer l'un ou l'autre de ces éléments. Il est donc nécessaire d'interpréter le contenu de l'entente PRV, la

Regulation”) must therefore be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. This interpretation exercise confirms that s. 19(2)(d) of the *CCAA* does not apply to the VRP claim.

First, it is clearly stipulated in the VRP agreement entered into by the parties that the amount fixed in the agreement can in no way be considered to constitute an admission of liability. As a result, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the *CCAA*.

Second, Bill 26 and the VRP Regulation do not create a statutory presumption or a presumption of fact that a debtor made fraudulent representations to a public body. The use of the words “may have been” in s. 3 of Bill 26 and in s. 1 of the VRP Regulation to describe the purpose of the VRP indicates that fraud is a possibility rather than a certainty. Section 7 of the VRP Regulation supports this point, since it states that the fact that a natural person or an enterprise participates in the VRP does not constitute an admission of liability or of a fault committed by the natural person or enterprise. The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8.

The City is wrong to say that reading ss. 1, 3 and 10 of Bill 26 together leads to the conclusion that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. Although s. 1 of Bill 26 does not refer to fraud as being hypothetical, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. Finally, the two schemes created by Bill 26 must not be confused. Section 10 states that fraud was committed, but this section is part of the scheme introduced by Chapter III (ss. 10 to 17), which applies to judicial proceedings brought against a natural person or enterprise that allegedly participated in fraud in relation to a public contract, and not part of the VRP scheme introduced by Chapter II (ss. 3 to 9). It is up to the courts to conclude that fraud has been committed, and the existence of fraud will be recognized by a court only under the Chapter III scheme, which did not take effect until the VRP scheme introduced by Chapter II ended. The reference to s. 10 in s. 3 merely serves to specify the natural persons

Loi 26 ainsi que son règlement d’application (« règlement PRV ») pour déterminer si la créance PRV peut être considérée dans le cadre d’une transaction ou d’un arrangement. Cet exercice d’interprétation confirme que la créance PRV n’est pas visée par l’al. 19(2)d) de la *LACC*.

En premier lieu, il est clairement stipulé dans l’entente PRV intervenue entre les parties que la somme convenue dans celle-ci ne peut en aucun cas être assimilée à une admission de responsabilité. On ne saurait donc présumer que la créance PRV constitue une réclamation visée à l’al. 19(2)d) de la *LACC*.

En deuxième lieu, la Loi 26, tout comme le règlement PRV, ne créent pas une présomption légale ou factuelle de l’existence de représentations frauduleuses de la part d’un débiteur à l’endroit d’un organisme public. L’emploi du conditionnel à l’art. 3 de la Loi 26 et à l’art. 1 du règlement PRV pour décrire l’objet du PRV signale que la fraude est une éventualité, par opposition à quelque chose de certain. L’article 7 du règlement PRV appuie ce constat puisqu’il précise que le fait pour une personne physique ou une entreprise de se prévaloir du PRV ne constitue pas une reconnaissance de responsabilité ni une admission qu’elle a commis une faute. La faute dont il est question à l’art. 7 relève de la responsabilité civile et se limite au contrat public visé par l’entente PRV. Lorsque le législateur entend faire référence à des procédures de nature pénale ou criminelle, ou encore à des recours civils se situant hors du champ de l’entente PRV, il le fait expressément. L’article 7 du règlement PRV, lu conjointement avec l’art. 8, confirme cette interprétation.

La Ville a tort de dire qu’une lecture conjointe des art. 1, 3 et 10 de la Loi 26 mène à une conclusion que la personne physique ou l’entreprise qui participe au PRV a nécessairement fraudé un organisme public. Bien que l’art. 1 de la Loi 26 ne traite pas de la fraude à titre hypothétique, l’art. 3 de la Loi 26 et l’art. 1 du règlement PRV sont clairs : les dispositions substantielles de la Loi 26 et du règlement PRV ne considèrent la fraude que de façon hypothétique. Enfin, il ne faut pas confondre les deux régimes créés par la Loi 26. L’article 10 énonce qu’une fraude a été commise, mais celui-ci fait partie du régime introduit par le chapitre III (art. 10 à 17) qui est applicable aux recours judiciaires intentés contre une personne physique ou une entreprise qui aurait participé à une fraude visant un contrat public, et non du régime du PRV, introduit par le chapitre II (art. 3 à 9). Il appartient aux tribunaux de conclure qu’une fraude a été commise, et la reconnaissance judiciaire de l’existence d’une fraude n’intervient que dans le régime propre au chapitre III, lequel entre en vigueur seulement lorsque le régime du

to whom the VRP applies. Accordingly, the City has not shown that the VRP claim falls within s. 19(2)(d) of the CCAA. Neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act.

Furthermore, a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law can be stayed by a court under ss. 11 and 11.02 of the CCAA. Under s. 11.02 of the CCAA, a court may stay any action, suit or other proceeding that might be brought against the debtor company. While at first glance the language of this provision limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order. A court has the power to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process. This includes a creditor's right to effect pre-post compensation. Such an interpretation advances the CCAA's remedial objectives and is consistent with its scheme.

In the vast majority of cases, an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. However, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. The absolute prohibition against pre-post compensation imposed by the Quebec Court of Appeal in *Kitco* must therefore be tempered. However, a court must be cautious before allowing such a form of compensation, given its high disruptive potential.

Moreover, s. 21 of the CCAA does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the CCAA. Read in light of its context, its purpose and the scheme of the CCAA, s. 21 is limited to authorizing compensation between debts that arise before an initial order is made ("pre-pre compensation") for the purpose of quantifying creditors' claims on the date of commencement of proceedings. This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the CCAA does not prohibit this form of compensation either. It follows that a supervising judge

PRV, introduit par le chapitre II, prend fin. Le renvoi à l'art. 10 dans l'art. 3 ne sert qu'à préciser quelles sont les personnes physiques visées par le PRV. En conséquence, la Ville n'a pas démontré que la créance PRV relevait de l'al. 19(2)d) de la LACC. Ni le contenu de l'entente PRV ni le cadre juridique qui lui est propre ne permettent de présumer que Groupe SM a admis avoir commis un acte frauduleux.

Par ailleurs, le droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law peut être suspendu par un tribunal en application des art. 11 et 11.02 de la LACC. L'article 11.02 de la LACC permet de suspendre toute action, poursuite ou autre procédure pouvant être intentée contre la compagnie débitrice. Bien que le texte de cette disposition limite à première vue aux procédures judiciaires l'application du pouvoir de suspension, la jurisprudence interprète de manière large et libérale l'étendue des droits et recours susceptibles d'être inclus dans une ordonnance de suspension. Le tribunal est habilité à suspendre des droits reconnus aux créanciers mais dont l'exercice serait susceptible de mettre en péril la restructuration, y compris le droit d'opérer compensation pré-post. Une telle interprétation favorise les objectifs réparateurs de la LACC, en plus d'être cohérente avec l'économie de cette loi.

Dans la très vaste majorité des cas, l'ordonnance initiale suspendra, et devrait suspendre, le droit d'un créancier d'opposer à la débitrice la compensation pré-post. En revanche, le tribunal peut à sa discrétion refuser d'imposer une telle interdiction ou, si la compensation pré-post a été suspendue par l'ordonnance, lever cette suspension par la suite pour permettre à un créancier intéressé de faire valoir ses droits. L'interdiction absolue énoncée par la Cour d'appel du Québec dans l'arrêt *Kitco* à l'égard de la compensation pré-post doit donc être tempérée. Cependant, le tribunal doit faire preuve de prudence avant de permettre une telle forme de compensation, considérant son fort potentiel perturbateur.

En outre, l'art. 21 de la LACC ne confère pas aux créanciers un droit à la compensation pré-post qui serait à l'abri du pouvoir de suspension dont dispose le juge surveillant en vertu des art. 11 et 11.02 de la LACC. Lu à la lumière de son contexte, de son objet et de l'esprit de la LACC, l'art. 21 se limite à autoriser la compensation entre des dettes nées avant le prononcé de l'ordonnance initiale (« compensation pré-pré ») aux fins de quantification des réclamations des créanciers au jour de l'ouverture. Cette disposition n'a pas pour effet d'autoriser la compensation pré-post. Cela dit, l'art. 21 de la LACC n'a pas non plus pour effet d'interdire cette forme de compensation. Il

retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

In exercising its discretion under the *CCAA*, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part. The first consideration relates both to the order itself and to the means that are employed. It is assessed in light of the *CCAA*'s remedial objectives, which include protecting the public interest. In very specific circumstances, a court could conclude that protection of the public interest and the *CCAA*'s other remedial objectives justify authorizing pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the *CCAA*. However, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors. The second consideration is also important because it discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage.

In the case at bar, the words of the stay order made by the Superior Court are broad enough to stay pre-post compensation, and it would not be appropriate to lift the stay in relation to the VRP claim. Because the City has not proved the alleged fraud and has not relied, in support of its position, on any of the *CCAA*'s remedial objectives other than protecting the public interest, it has not discharged its burden of proving that the order being sought is appropriate. In addition, the City did not act with the diligence expected in *CCAA* proceedings.

With regard to the water meter contract claim, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in that case. That order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of that case would not be appropriate for the same reasons as those relating to the VRP claim.

s'ensuit que le juge surveillant conserve le pouvoir discrétionnaire de suspendre ou d'autoriser l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law.

Dans l'exercice du pouvoir discrétionnaire que lui confère la *LACC*, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur. La première considération vise tout autant l'ordonnance elle-même que les moyens utilisés et s'évalue au regard des objectifs réparateurs de la *LACC*, dont la protection de l'intérêt public. Dans des circonstances bien particulières, le tribunal pourrait conclure que la protection de l'intérêt public, de même que les autres objectifs réparateurs de la *LACC*, justifient d'autoriser la compensation pré-post en faveur d'un créancier qui a démontré avoir été victime de fraude au sens de l'al. 19(2)d) de la *LACC*. Par contre, le tribunal doit se garder de réduire l'intérêt public à l'intérêt d'un créancier ou d'un groupe de créanciers en particulier. La deuxième considération est également importante étant donné qu'elle décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage.

Dans la présente affaire, les termes de l'ordonnance de suspension rendue par la Cour supérieure sont suffisamment larges pour suspendre la compensation pré-post et il n'est pas indiqué de lever cette suspension en ce qui concerne la créance PRV. Puisque la Ville n'a pas apporté la preuve de la fraude alléguée et n'a pas invoqué un objectif réparateur de la *LACC* autre que la protection de l'intérêt public au soutien de sa position, elle ne s'est pas déchargée du fardeau qui lui incombait d'établir le caractère indiqué de l'ordonnance sollicitée. Au surplus, la Ville n'a pas fait montre de la diligence attendue dans le cadre d'une procédure fondée sur la *LACC*.

Pour ce qui est de la créance relative au contrat des compteurs d'eau, la Cour supérieure a accepté de lever la suspension des procédures pour permettre à la Ville d'établir l'existence et le montant de sa créance dans ce dossier. Cette ordonnance n'a pas autorisé la Ville à retenir les sommes dues à Groupe SM pour les travaux postérieurs à l'ordonnance initiale en vue d'opérer compensation dans l'éventualité où elle aurait gain de cause dans le dossier relatif au contrat des compteurs d'eau. Dans les circonstances, une ordonnance permettant à la Ville de retenir les sommes dues à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau ne serait pas indiquée pour les mêmes motifs que ceux relatifs à la créance PRV.

Per Brown J. (dissenting): The appeal should be allowed solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect pre-post compensation for the VRP claim and whether compensation is available in respect of the water meter claim. There is agreement with the majority that a supervising judge has a discretion under s. 11 of the CCAA as to whether to allow a creditor to effect pre-post compensation, or set-off. However, this discretion is not limited solely to the exceptional circumstances the majority describes. The scope of s. 21 of the CCAA is not limited to pre-pre compensation; pre-post compensation is permitted, but must be subject to the exercise of a supervising judge's discretion. Moreover, nothing in s. 21 of the CCAA prohibits judicial compensation.

The approach taken by the Quebec Court of Appeal in *Kitco*, according to which pre-post compensation will never be authorized under the CCAA, involves several errors and must be rejected. To begin with, the Court of Appeal erred in relying on a judgment rendered by the Court in the context of a bankruptcy under the *Bankruptcy and Insolvency Act* (“BIA”). Although the scheme established by the CCAA and the one established by the BIA must be viewed as an integrated body of insolvency law, there remain many differences between them, including two that are fundamental. First, when an insolvent company has recourse to the CCAA, it continues its business activities and is not divested of its property in favour of a third party, unlike with the measures put in place under the BIA that vest the bankrupt's property in a trustee. There is thus no loss of mutuality under the CCAA. This mutuality, which survives the initial order, is what makes compensation possible under the CCAA, unlike under the BIA. Secondly, the scheme established by the CCAA is flexible and allows creative solutions to be put forward to achieve the objective of restructuring a financially distressed company, in contrast to the BIA, which provides a set of pre-established rules. The CCAA's provisions must be interpreted expansively to enable its remedial objectives to be achieved. Because of these objectives, a broad discretion is also conferred on supervising judges by s. 11 of the CCAA. This discretion has no equivalent in the BIA.

Next, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the CCAA, subject to a supervising judge's discretion to stay such set-off having

Le juge Brown (dissident) : L'appel devrait être accueilli à seule fin de retourner le dossier devant la Cour supérieure pour qu'il soit décidé, d'une part, si la Ville peut opérer compensation pré-post à l'égard de la créance PRV et, d'autre part, si la réclamation à l'égard des compteurs d'eau donne ouverture à compensation. Il y a accord avec l'avis de la majorité portant que le juge surveillant possède, en vertu de l'art. 11 de la LACC, le pouvoir discrétionnaire d'autoriser ou non un créancier à opérer compensation pré-post. Cependant, ce pouvoir n'est pas limité aux seules circonstances exceptionnelles décrites par la majorité. Le champ d'application de l'art. 21 de la LACC n'est pas restreint à la compensation pré-pré; la compensation pré-post est permise, mais doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. De plus, rien dans l'art. 21 de la LACC n'interdit la compensation judiciaire.

L'approche établie par la Cour d'appel du Québec dans l'arrêt *Kitco*, selon laquelle la compensation pré-post ne sera jamais autorisée en vertu de la LACC, contient plusieurs erreurs et doit être rejetée. Tout d'abord, la Cour d'appel s'appuie erronément sur un arrêt de la Cour rendu dans un contexte de faillite sous le régime de la *Loi sur la faillite et l'insolvabilité* (« LFI »). Or, bien que le régime établi par la LACC et celui établi par la LFI doivent être perçus comme un ensemble intégré de règles du droit de l'insolvabilité, de nombreuses différences persistent entre ceux-ci, dont deux distinctions fondamentales. Premièrement, lorsque l'entreprise insolvable a recours à la LACC, elle continue ses opérations commerciales et n'est pas dessaisie de ses biens au profit d'un tiers, contrairement aux mesures mises en place en vertu de la LFI, suivant lesquelles le syndic obtient la saisine des biens du failli. Il n'y a donc pas de perte de réciprocité sous le régime de la LACC. Cette réciprocité, qui subsiste au-delà de l'ordonnance initiale, est ce qui rend possible la compensation en vertu de la LACC, par opposition à la LFI. Deuxièmement, le régime établi par la LACC est flexible et permet de mettre de l'avant des solutions créatives afin d'atteindre l'objectif de restructuration d'une entreprise en difficultés financières, par contraste avec la LFI, qui prévoit un ensemble de règles préétablies. Les dispositions de la LACC doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, en raison desquels un vaste pouvoir discrétionnaire est également conféré au juge surveillant par l'art. 11 de la LACC. Ce pouvoir n'a pas d'équivalent dans la LFI.

Ensuite, l'état du droit ailleurs au Canada est clair : la compensation pré-post est possible sous le régime de la LACC, sous réserve du pouvoir discrétionnaire du juge

regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the CCAA. The approach proposed in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the CCAA by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces, which is contrary to the principle of homogenous interpretation of federal statutes.

Lastly, staying the remedies of an insolvent company's creditors under the CCAA to allow the company to develop a plan of arrangement is of critical importance. However, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to effect pre-post compensation, since the insolvent company will become an "empty shell" after the sale. Moreover, allowing pre-post compensation will not have the effect of derailing the company's restructuring process, as there is no such process in this situation.

In the instant case, there is no need to decide whether the VRP claim must be characterized as a claim based on "false pretences or fraudulent misrepresentation" within the meaning of s. 19(2)(d) of the CCAA. Section 21 of the CCAA must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). It is true that proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge's discretion to permit pre-post compensation; however, whether the City's VRP claim results from fraud is a question to be decided by the supervising judge, not by the Court.

Given that the supervising judge did not exercise her discretion under s. 11 of the CCAA, believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, it is not for the Court to exercise that discretion in order to determine whether to permit pre-post compensation. Supervising judges are in the best position to decide whether to exercise their discretion in a particular case. In cases involving an exercise of discretion by a court of first

surveillant d'en suspendre l'application pour tenir compte des incidences de la compensation pré-post sur la période de statu quo et de ses objectifs sous-jacents, du bon déroulement des efforts déployés pour réaliser un arrangement et des objectifs réparateurs de la LACC. L'approche avancée dans l'arrêt *Kitco* crée une asymétrie entre l'interprétation de l'art. 21 de la LACC par les tribunaux du Québec et par les tribunaux d'autres provinces canadiennes, qui va à l'encontre du principe de l'interprétation uniforme des lois fédérales.

Enfin, la suspension, en vertu de la LACC, des recours des créanciers d'une entreprise insolvable afin de permettre à celle-ci d'élaborer un plan d'arrangement revêt une importance cruciale. Par contre, lorsqu'un plan d'arrangement n'est pas envisageable et que l'entreprise insolvable sera de toute manière liquidée ou vendue, conclure que la compensation pré-post n'est jamais permise pourrait être injuste pour les créanciers de cette entreprise ayant une créance certaine, liquide et exigible. En effet, dans ces cas, les recours des créanciers seront suspendus indéfiniment et ils ne pourront jamais exercer compensation pré-post, l'entreprise insolvable étant devenue après la vente une « coquille vide ». Par ailleurs, permettre la compensation pré-post n'aura pas comme effet de faire dérailler le processus de restructuration de l'entreprise, ce processus étant alors inexistant.

En l'espèce, il n'est pas nécessaire de trancher la question de savoir si la créance PRV doit être qualifiée de réclamation fondée sur des « faux-semblants ou la présentation erronée et frauduleuse des faits » au sens de l'al. 19(2)d) de la LACC. L'article 21 de la LACC doit être interprété comme permettant d'opérer compensation pré-post, peu importe qu'il s'agisse ou non d'une réclamation qui découle d'une fraude au sens de l'al. 19(2)d). Certes, la démonstration du caractère frauduleux de la dette à l'origine d'une créance constitue un facteur pertinent dans l'exercice par le juge surveillant de son pouvoir discrétionnaire de permettre la compensation pré-post; cependant, la question de savoir si la créance PRV de la Ville résulte d'une fraude est une question à laquelle il appartient à la juge surveillante de répondre, et non à la Cour.

Étant donné que, s'estimant liée par les conclusions de la Cour d'appel du Québec dans l'arrêt *Kitco*, la juge surveillante n'a pas exercé le pouvoir discrétionnaire que lui confère l'art. 11 de la LACC, il ne revient pas à la Cour de l'exercer afin de décider s'il y a lieu d'autoriser ou non la compensation pré-post. Les juges surveillants sont les mieux placés pour décider s'ils doivent exercer leur pouvoir discrétionnaire dans une situation donnée.

instance, it is not in the interests of justice for the Court to step into that court's shoes and decide these matters.

Cases Cited

By Wagner C.J. and Côté J.

Overruled: *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268; **considered:** *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, aff'd 2015 BCCA 426, 378 B.C.A.C. 116; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147; *Air Canada, Re* (2003), 45 C.B.R. (4th) 13; **referred to:** *R. v. Fedele*, 2018 QCCA 1901; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522; *Léger v. Ouellet*, 2011 QCCA 1858; *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225; *Lambert v. Macara*, [2004] R.J.Q. 2637; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710; *Terrain DEV Immobilier inc. v. Charron*, 2021 QCCA 417; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164; *Tavan v. Rostami*, 2014 QCCA 304; *Guilbert v. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280; *Sharma v. Sandhu*, 2019 MBQB 160; *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102, aff'd (1985), 53 C.B.R. (N.S.) 275; *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261; *Johnson v. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369; *Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145; *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54; *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1; *Associated Investors of Canada Ltd. (Manager of) v. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Stein v. Blake*, [1996] 1 A.C. 243; *Woodward's*

Dans les affaires qui reposent sur l'exercice d'un pouvoir discrétionnaire par un tribunal de première instance, il n'est pas dans l'intérêt de la justice que la Cour se mette à la place de ce tribunal et tranche ces questions.

Jurisprudence

Citée par le juge en chef Wagner et la juge Côté

Arrêt rejeté : *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173; **arrêts examinés :** *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, conf. par 2015 BCCA 426, 378 B.C.A.C. 116; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147; *Air Canada, Re* (2003), 45 C.B.R. (4th) 13; **arrêts mentionnés :** *R. c. Fedele*, 2018 QCCA 1901; *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; 9354-9186 *Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522; *Léger c. Ouellet*, 2011 QCCA 1858; *Dupuis c. Cernato Holdings Inc.*, 2019 QCCA 376; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225; *Lambert c. Macara*, [2004] R.J.Q. 2637; *Canada Mortgage and Housing Corp. c. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710; *Terrain DEV Immobilier inc. c. Charron*, 2021 QCCA 417; *Pelletier c. CAE Rive-Nord*, 2019 QCCA 2164; *Tavan c. Rostami*, 2014 QCCA 304; *Guilbert c. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280; *Sharma c. Sandhu*, 2019 MBQB 160; *Royal Bank of Canada c. Hejna*, 2013 ONSC 1719; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102, conf. par (1985), 53 C.B.R. (N.S.) 275; *Agriculture Financial Services Corp. c. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255; *The Toronto-Dominion Bank c. Merenick*, 2007 BCSC 1261; *Johnson c. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369; *Meridian Developments Inc. c. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145; *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54; *Parc industriel Laprade inc. c. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1; *Associated Investors of Canada Ltd. (Manager of) c. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Husky Oil Operations Ltd. c. Ministre*

Ltd., Re (1993), 79 B.C.L.R. (2d) 257; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11; *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299.

By Brown J. (dissenting)

Quebec (Agence du revenu) v. Kitco Metals Inc., 2017 QCCA 268; *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105; *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, aff'd 2015 BCCA 426, 378 B.C.A.C. 116; *Re Just Energy Corp.*, 2021 ONSC 1793; *Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132; *Air Canada, Re* (2003), 45 C.B.R. (4th) 13; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147; *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, [2021] 2 S.C.R. 704.

Statutes and Regulations Cited

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12.

Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR, c. R-2.2.0.0.3, ss. 1, Chapter II, 3 to 9, Chapter III, 10 to 17.

Act to give effect to the Charbonneau Commission recommendations on political financing, S.Q. 2016, c. 18.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 71, 97(3), 121(1), 178(1)(e).

Civil Code of Québec, art. 2849.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6(1), Part II, 11, 11.01, 11.02, 11.08, 11.1, Part III, 19, 20, 21, 32.

Integrity in Public Contracts Act, S.Q. 2012, c. 25.

Voluntary Reimbursement Program, CQLR, c. R-2.2.0.0.3, r. 1, ss. 1, 4, 7, 8.

du Revenu national, [1995] 3 R.C.S. 453; *Stein c. Blake*, [1996] 1 A.C. 243; *Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11; *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299.

Citée par le juge Brown (dissident)

Québec (Agence du revenu) c. Métaux Kitco inc., 2017 QCCA 268, 46 C.B.R. (6th) 173; *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, 2005 CSC 52, [2005] 2 R.C.S. 564; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; 9354-9186 *Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105; *Cam-Net Communications c. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, conf. par 2015 BCCA 426, 378 B.C.A.C. 116; *Re Just Energy Corp.*, 2021 ONSC 1793; *Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132; *Air Canada, Re* (2003), 45 C.B.R. (4th) 13; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147; *Société Radio-Canada c. Manitoba*, 2021 CSC 33, [2021] 2 R.C.S. 704.

Lois et règlements cités

Code civil du Québec, art. 2849.

Loi donnant suite aux recommandations de la Commission Charbonneau en matière de financement politique, L.Q. 2016, c. 18.

Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu, L.C. 1997, c. 12.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 71, 97(3), 121(1), 178(1)e).

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 6(1), partie II, 11, 11.01, 11.02, 11.08, 11.1, partie III, 19, 20, 21, 32.

Loi sur les liquidations et les restructurations, L.R.C. 1985, c. W-11, art. 73(1).

Loi sur l'intégrité en matière de contrats publics, L.Q. 2012, c. 25.

Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 73(1).

Authors Cited

- Alberta. Court of Queen's Bench. *Alberta Template CCAA Initial Order*, January 2019 (online: [https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-\(alberta\)---jakr-markup65b9d3391b316d6b9fc9ff00001037d2.pdf?sfvrsn=e986ad80_4](https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-(alberta)---jakr-markup65b9d3391b316d6b9fc9ff00001037d2.pdf?sfvrsn=e986ad80_4); archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_1_eng.pdf).
- Anderson, A. Robert, Thomas Gelbman and Benjamin Pullen. "Recent Developments in the Law of Set-off", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009*. Toronto: Carswell, 2010, 1.
- Boucher, Bernard. "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration*, par Stéphane Rousseau, dir. Montréal: LexisNexis, 2010, fascicule 14 (feuilles mobiles mises à jour avril 2021, envoi n° 20).
- British Columbia. Supreme Court. *Model CCAA Initial Order*, August 1, 2015 (online: https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/CCAA_Model_Initial_Order.docx; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_2_eng.pdf).
- Brochu, Denis. *Précis de la faillite et de l'insolvabilité*, 5^e éd. Montréal: LexisNexis, 2016.
- Code civil du Québec: Annotations — Commentaires 2020-2021*, 5^e éd. par Benoît Moore, dir., et autres. Montréal: Yvon Blais, 2020.
- Edwards, Stanley E. "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587.
- Houlden, L. W., G. B. Morawetz and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 3, 4th ed. rev. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2021, release 3).
- Keay, Andrew. "Insolvency Law: A Matter of Public Interest?" (2000), 51 *N. Ir. Legal Q.* 509.
- McElcheran, Kevin P. *Commercial Insolvency in Canada*, 4th ed. Toronto: LexisNexis, 2019.
- Morin, Luc, and Guillaume-Pierre Michaud. "Set-Off and Compensation in Insolvency Restructuring under the BIA/CCAA: After the *Kitco* and *Beyond the Rack Decisions*", in Janis P. Sarra and Barbara Romaine,

manœuvres dolosives dans le cadre de contrats publics, RLRQ, c. R-2.2.0.0.3, art. 1, chapitre II, 3 à 9, chapitre III, 10 à 17.

Programme de remboursement volontaire, RLRQ, c. R-2.2.0.0.3, r. 1, art. 1, 4, 7, 8.

Doctrine et autres documents cités

- Alberta. Cour du Banc de la Reine. *Alberta Template CCAA Initial Order*, January 2019 (en ligne : [https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-\(alberta\)---jakr-markup65b9d3391b316d6b9fc9ff00001037d2.pdf?sfvrsn=e986ad80_4](https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-(alberta)---jakr-markup65b9d3391b316d6b9fc9ff00001037d2.pdf?sfvrsn=e986ad80_4); version archivée : https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_1_eng.pdf).
- Anderson, A. Robert, Thomas Gelbman and Benjamin Pullen. « Recent Developments in the Law of Set-off », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009*, Toronto, Carswell, 2010, 1.
- Boucher, Bernard. « Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration*, par Stéphane Rousseau, dir., Montréal, LexisNexis, 2010, fascicule 14 (feuilles mobiles mises à jour avril 2021, envoi n° 20).
- Brochu, Denis. *Précis de la faillite et de l'insolvabilité*, 5^e éd., Montréal, LexisNexis, 2016.
- Code civil du Québec : Annotations — Commentaires 2020-2021*, 5^e éd. par Benoît Moore, dir., et autres, Montréal, Yvon Blais, 2020.
- Colombie-Britannique. Cour suprême. *Model CCAA Initial Order*, August 1, 2015 (en ligne : https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/CCAA_Model_Initial_Order.docx; version archivée : https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_2_eng.pdf).
- Edwards, Stanley E. « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587.
- Houlden, L. W., G. B. Morawetz and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 3, 4th ed. rev., Toronto, Thomson Reuters, 2019 (loose-leaf updated 2021, release 3).
- Keay, Andrew. « Insolvency Law : A Matter of Public Interest? » (2000), 51 *N. Ir. Legal Q.* 509.
- McElcheran, Kevin P. *Commercial Insolvency in Canada*, 4th ed., Toronto, LexisNexis, 2019.
- Morin, Luc, and Guillaume-Pierre Michaud. « Set-Off and Compensation in Insolvency Restructuring under the BIA/CCAA : After the *Kitco* and *Beyond the Rack Decisions* », in Janis P. Sarra and Barbara Romaine,

- eds., *Annual Review of Insolvency Law 2016*. Toronto: Thomson Reuters, 2017, 311.
- Ontario. Superior Court of Justice. Commercial List. *Initial Order*, January 21, 2014 (online: <https://www.ontariocourts.ca/scj/files/forms/com/intitial-order-CCAA-EN.doc>; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_3_eng.pdf).
- Quebec. Superior Court. Commercial Division. *Initial Order*, May 2014 (online: https://www.barreaudemontreal.qc.ca/sites/default/files/frm-ordonnanceinitiale_mai2014.doc; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_4_eng.pdf).
- Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. Toronto: Carswell, 2013.
- Sarra, Janis P. "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2016*. Toronto: Thomson Reuters, 2017, 9.
- Sarra, Janis P., Geoffrey B. Morawetz and L. W. Houlden. *The 2020-2021 Annotated Bankruptcy And Insolvency Act*. Toronto: Thomson Reuters, 2020.
- Saskatchewan. Court of Queen's Bench. *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (online: <https://sasklawcourts.ca/wp-content/uploads/2021/07/QB1.CCAAINitialOrder.docx>; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_5_eng.pdf).
- Thornton, Robert. "Air Canada and Stelco: Legal Developments and Practical Lessons", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2006*. Toronto: Thomson/Carswell, 2007, 73.
- Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed. Toronto: Irwin Law, 2015.

APPEAL from a judgment of the Quebec Court of Appeal (Rochette, Healy and Ruel JJ.A.), 2020 QCCA 438, [2020] J.Q. n° 1852 (QL), 2020 CarswellQue 1987 (WL Can.), affirming a decision of Coriveau J., 2019 QCCS 2316, [2019] J.Q. n° 4840 (QL), 2019 CarswellQue 5032 (WL Can.). Appeal dismissed, Brown J. dissenting.

Raphaël Lescop and Eleni Yiannakis, for the appellant.

Guy P. Martel and Danny Duy Vu, for the respondent.

- eds., *Annual Review of Insolvency Law 2016*, Toronto, Thomson Reuters, 2017, 311.
- Ontario. Cour supérieure de justice. Rôle des affaires commerciales. *Ordonnance initiale*, 21 janvier 2014 (en ligne : <https://www.ontariocourts.ca/scj/files/forms/com/intitial-order-CCAA-FR.doc>; version archivée : https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_3_fra.pdf).
- Québec. Cour supérieure. Chambre commerciale. *Ordonnance initiale*, mai 2014 (en ligne : https://www.barreaudemontreal.qc.ca/sites/default/files/frm-ordonnanceinitiale_mai2014.doc; version archivée : https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_4_fra.pdf).
- Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed., Toronto, Carswell, 2013.
- Sarra, Janis P. « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2016*, Toronto, Thomson Reuters, 2017, 9.
- Sarra, Janis P., Geoffrey B. Morawetz and L. W. Houlden. *The 2020-2021 Annotated Bankruptcy And Insolvency Act*, Toronto, Thomson Reuters, 2020.
- Saskatchewan. Cour du Banc de la Reine. *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (en ligne : <https://sasklawcourts.ca/wp-content/uploads/2021/07/QB1.CCAAINitialOrder.docx>; version archivée : https://www.scc-csc.ca/cso-dce/2021SCC-CSC53_5_eng.pdf).
- Thornton, Robert. « Air Canada and Stelco : Legal Developments and Practical Lessons », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2006*, Toronto, Thomson/Carswell, 2007, 73.
- Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed., Toronto, Irwin Law, 2015.

POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Rochette, Healy et Ruel), 2020 QCCA 438, [2020] J.Q. n° 1852 (QL), 2020 CarswellQue 1987 (WL Can.), qui a confirmé une décision de la juge Coriveau, 2019 QCCS 2316, [2019] J.Q. n° 4840 (QL), 2019 CarswellQue 5032 (WL Can.). Pourvoi rejeté, le juge Brown est dissident.

Raphaël Lescop et Eleni Yiannakis, pour l'appelante.

Guy P. Martel et Danny Duy Vu, pour l'intimée.

Alain Tardif, for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP.

Luc Béliveau, for the intervenor Thornhill Investments Inc.

Elizabeth Ferland, for the intervenor Ville de Laval.

Marc Duchesne, for the intervenor Union des municipalités du Québec.

English version of the judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Martin JJ. delivered by

THE CHIEF JUSTICE AND CÔTÉ J. —

TABLE OF CONTENTS

	Paragraph
I. <u>Introduction</u>	1
II. <u>Facts</u>	6
III. <u>Judicial History</u>	14
A. <i>Quebec Superior Court, 2019 QCCS 2316 (Corriveau J.)</i>	14
B. <i>Quebec Court of Appeal, 2020 QCCA 438 (Rochette and Healy J.J.A., Ruel J.A. Dissenting in Part)</i>	15
IV. <u>Issues</u>	17
V. <u>Analysis</u>	19
A. <i>Voluntary Reimbursement Program Claim</i>	21
(1) <u>Characterization of the Voluntary Reimbursement Program Claim</u>	21
(2) <u>Compensation Between Debts Arising Before and After an Initial Order (Pre-post Compensation)</u>	44

Alain Tardif, pour les intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP.

Luc Béliveau, pour l'intervenante Thornhill Investments Inc.

Elizabeth Ferland, pour l'intervenante la Ville de Laval.

Marc Duchesne, pour l'intervenante l'Union des municipalités du Québec.

Le jugement du juge en chef Wagner et des juges Moldaver, Karakatsanis, Côté, Rowe et Martin a été rendu par

LE JUGE EN CHEF ET LA JUGE CÔTÉ —

TABLE DES MATIÈRES

	Paragraphe
I. <u>Introduction</u>	1
II. <u>Faits</u>	6
III. <u>Historique judiciaire</u>	14
A. <i>Cour supérieure du Québec, 2019 QCCS 2316 (la juge Corriveau)</i>	14
B. <i>Cour d'appel du Québec, 2020 QCCA 438 (les juges Rochette et Healy, le juge Ruel, dissident en partie)</i>	15
IV. <u>Questions en litige</u>	17
V. <u>Analyse</u>	19
A. <i>Créance du Programme de remboursement volontaire</i>	21
(1) <u>Qualification de la créance du Programme de remboursement volontaire</u>	21
(2) <u>Compensation entre des dettes nées avant et après le prononcé de l'ordonnance initiale (compensation pré-post)</u>	44

(a)	<i>Power to Grant and Lift a Stay of the Right to Pre-post Compensation</i>	54
(b)	<i>Scope of Section 21 of the CCAA</i>	63
(c)	<i>Application</i>	83
B.	<i>Water Meter Contract Claim</i>	96
VI.	<u>Conclusion</u>	100
I.	<u>Introduction</u>	

[1] This appeal raises an issue relating to compensation, or set-off in a common law setting, between two debts in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The question is whether compensation is permitted for debts between the same parties: on the one hand, a debt resulting from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3 ("Bill 26"), that predates an initial order made under the CCAA and, on the other hand, a debt between the same parties that postdates that order. In these reasons, we will use the expression "pre-post compensation" to refer generally to compensation between debts arising before and after an initial order.

[2] This question thus affords the Court an occasion to interpret, for the first time, certain provisions of Bill 26 as well as the regulation made under it, the *Voluntary Reimbursement Program*, CQLR, c. R-2.2.0.0.3, r. 1 ("VRP Regulation"). In doing so, we will clarify for public bodies the burden of proof that rests on them in seeking to establish that a claim arising from an agreement entered into under the Voluntary Reimbursement Program ("VRP") is fraudulent.

[3] Bill 26 was passed by the Quebec National Assembly in March 2015 in response to a commission

a)	<i>Pouvoir d'accorder et de lever une suspension du droit à la compensation pré-post</i>	54
b)	<i>La portée de l'art. 21 de la LACC</i>	63
c)	<i>Application</i>	83
B.	<i>Créance relative au contrat des compteurs d'eau</i>	96
VI.	<u>Conclusion</u>	100
I.	<u>Introduction</u>	

[1] Le présent pourvoi soulève un problème de compensation entre deux dettes dans le contexte de procédures engagées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« LACC »). Il s'agit de savoir si la compensation est permise entre des dettes entre les mêmes parties, d'une part, une dette résultant de la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3 (« Loi 26 »), antérieure à une ordonnance initiale émise en vertu de la LACC, et, d'autre part, une dette postérieure à cette ordonnance encourue entre les mêmes parties. Dans les présents motifs, nous utiliserons l'expression « compensation pré-post » pour désigner de manière générale la compensation entre des dettes nées avant et après l'émission d'une ordonnance initiale.

[2] Cette question fournit ainsi à notre Cour l'occasion d'interpréter pour la première fois certaines dispositions de la Loi 26, ainsi que son règlement d'application, le *Programme de remboursement volontaire*, RLRQ, c. R-2.2.0.0.3, r. 1 (« règlement PRV »). Ce faisant, nous clarifions, à l'intention des organismes publics, le fardeau de preuve qui leur incombe lorsqu'ils tentent d'établir le caractère frauduleux d'une créance résultant d'une entente conclue en vertu du Programme de remboursement volontaire (« PRV »).

[3] La Loi 26 a été adoptée par l'Assemblée nationale du Québec en mars 2015 à la suite d'une

of inquiry that had brought to light the existence of schemes involving collusion and corruption in the awarding and management of public contracts in the construction industry (“Charbonneau Commission”), and the VRP Regulation was made a few months later. The program resulting from this legislation, which was in effect for two years, allowed enterprises to “reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics” (s. 3 of Bill 26).

[4] To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a “claim that relates to” a “debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation” pursuant to s. 19(2)(d) of the CCAA. We would answer this question in the negative. It cannot be presumed that a claim arising from the VRP falls within that provision where no evidence to this effect has been tendered. We also conclude that a court should generally exercise its discretion to stay pre-post compensation, although it may, in rare cases, refuse such a stay. As well, the court may later lift the stay of the right to pre-post compensation in appropriate cases. In the case at bar, however, we conclude that the initial order stayed the right of the appellant, Ville de Montréal (“City”), to pre-post compensation and that it would not be appropriate to lift the stay in relation to the claims in issue.

[5] The appeal should therefore be dismissed.

II. Facts

[6] SM Group, which at the relevant time was a consulting engineering firm, performed a variety of contracts for the City over a period of several years. The Charbonneau Commission’s work uncovered a

commission d’enquête qui a mis en lumière l’existence de stratagèmes de collusion et de corruption dans l’octroi et la gestion de contrats publics dans l’industrie de la construction (« Commission Charbonneau »), et le règlement PRV a été pris quelques mois plus tard. Mis en vigueur pour une période de deux ans, le programme issu de cette loi a permis à des entreprises de « rembourser certaines sommes payées injustement dans le cadre de l’adjudication, de l’attribution ou de la gestion d’un contrat public et pour lequel il aurait pu y avoir fraude ou manœuvre dolosive » (art. 3 de la Loi 26).

[4] Pour trancher la question relative à la compensation dans le contexte du présent pourvoi, notre Cour doit d’abord déterminer si une créance découlant d’une entente conclue dans le cadre du PRV constitue nécessairement une « réclamation se rapportant à » une « dette ou obligation résultant de l’obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits » aux termes de l’al. 19(2)d) de la LACC. Nous sommes d’avis de répondre à cette question par la négative. On ne peut présumer qu’une créance issue du PRV est visée par cette disposition lorsqu’aucune preuve n’a été administrée à cet effet. Nous concluons par ailleurs que le tribunal devrait généralement exercer son pouvoir discrétionnaire afin de suspendre la compensation pré-post, bien qu’il puisse, dans de rares cas, refuser de la suspendre. De même, le tribunal peut, par la suite, lever la suspension du droit à la compensation pré-post dans les cas qui s’y prêtent. En l’espèce, toutefois, nous concluons que l’ordonnance initiale a suspendu le droit de l’appelante Ville de Montréal (« Ville ») à la compensation pré-post et qu’il n’est pas indiqué de lever cette suspension pour ce qui est des créances en litige.

[5] En conséquence, l’appel doit être rejeté.

II. Faits

[6] Groupe SM, qui était au moment des faits une firme de génie-conseil, a exécuté divers contrats pour la Ville sur une période de plusieurs années. Les travaux de la Commission Charbonneau ont

link between SM Group and certain central players in the collusion schemes. Two of its former officers were in fact charged with criminal offences. SM Group subsequently became insolvent.

révélé l'existence d'un lien entre Groupe SM et des acteurs au cœur des stratagèmes de collusion. Deux de ses anciens dirigeants ont d'ailleurs fait l'objet d'accusations criminelles. Par la suite, Groupe SM est devenu insolvable.

[7] On August 24, 2018, the Quebec Superior Court made an initial order by which SM Group became subject to proceedings under the CCAA and the rights and remedies of creditors were stayed. The respondent, Deloitte Restructuring Inc. (“Deloitte”), was appointed as monitor. Following that order, SM Group continued to perform work for the City, including the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

[7] Le 24 août 2018, la Cour supérieure du Québec (« Tribunal ») rend une ordonnance initiale assujettissant Groupe SM à des procédures déposées en vertu de la LACC et suspendant les droits et recours des créanciers. L'intimée Restructuration Deloitte Inc. (« Deloitte ») est nommée à titre de contrôleur. Postérieurement à cette ordonnance, Groupe SM continue à effectuer des travaux dont bénéficie la Ville, notamment la construction du pont Samuel-De Champlain et la réfection de l'échangeur Turcot.

[8] The City refused to pay for that work. On November 7, 2018, it invoked its right to effect compensation between its debt to SM Group for the work done after the initial order and two claims against SM Group that, according to the City, arose before the order and resulted from fraud on SM Group's part.

[8] La Ville refuse de payer ces travaux. Le 7 novembre 2018, elle invoque son droit d'opérer compensation entre sa dette envers Groupe SM résultant des travaux effectués postérieurement à l'ordonnance initiale, et deux créances de Groupe SM qui, soutient-elle, sont nées avant l'ordonnance et résulteraient de fraude de ce dernier.

[9] On November 12, 2018, the Superior Court approved the sale of some of SM Group's assets to Thornhill Investments Inc. (“Thornhill”). One week later, SM Group's contracts were assigned to Thornhill.

[9] Le 12 novembre 2018, le Tribunal approuve la vente partielle des actifs de Groupe SM à Thornhill Investments Inc. (« Thornhill »). Une semaine plus tard, les contrats de Groupe SM sont cédés à Thornhill.

[10] The two claims raised by the City are related to the application of Bill 26. The purpose of that statute, read in conjunction with the *Integrity in Public Contracts Act*, S.Q. 2012, c. 25, enacted in 2012, and the *Act to give effect to the Charbonneau Commission recommendations on political financing*, S.Q. 2016, c. 18, enacted in 2016, is to strengthen public confidence in government institutions by addressing the revelations made by the Charbonneau Commission. Bill 26 has been described as [TRANSLATION] “a statutory benchmark for establishing a lack of ethics and lax (if not criminal) morals in a number of enterprises in relation to the awarding of public contracts in Quebec” (*R. v. Fedele*, 2018 QCCA 1901, at para. 44 (CanLII)).

[10] Les deux créances invoquées par la Ville sont liées à l'application de la Loi 26. Lue avec la *Loi sur l'intégrité en matière de contrats publics*, L.Q. 2012, c. 25, adoptée en 2012, et la *Loi donnant suite aux recommandations de la Commission Charbonneau en matière de financement politique*, L.Q. 2016, c. 18, adoptée en 2016, la Loi 26 a pour objectif de renforcer la confiance du public dans les institutions publiques en donnant suite aux révélations émanant de la Commission Charbonneau. Elle a été décrite comme « un repère législatif permettant de conclure au manque d'éthique et à la morale laxiste (sinon criminelle) dans plusieurs entreprises en lien avec l'octroi de contrats publics au Québec » (*R. c. Fedele*, 2018 QCCA 1901, par. 44 (CanLII)).

[11] The first claim the City alleges it has against SM Group arises from a settlement agreement entered into in November 2017 by SM Group and the Minister of Justice, acting on the City's behalf, under the VRP ("VRP claim"). The second is based on a proceeding brought by the City against SM Group in September 2018, in which it claimed more than \$14 million from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract ("water meter contract claim").

[12] Because SM Group had failed to repay the VRP claim and because the sale of certain assets to Thornhill was imminent, the City advised SM Group that it intended to effect compensation between what it owed SM Group and the above-mentioned claims, noting that those claims could not be discharged or dealt with by a compromise or arrangement in the planned restructuring process given that they resulted from fraud and from a misappropriation of public funds.

[13] In response, Deloitte applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group for work performed for the City.

III. Judicial History

A. *Quebec Superior Court, 2019 QCCS 2316 (Corriveau J.)*

[14] The supervising judge granted Deloitte's application for a declaratory judgment and held that pre-post compensation could not be effected in favour of the City. Even though, in her view, the VRP claim was linked to an allegation of fraud that had not been refuted by SM Group, she concluded that, according to the principles laid down in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, pre-post compensation was not possible. She also concluded that the water meter contract claim was neither liquid nor exigible, which precluded compensation.

[11] La première créance que la Ville prétend détenir contre Groupe SM résulte d'une entente de règlement intervenue en novembre 2017 entre Groupe SM et la ministre de la Justice, agissant pour le compte de la Ville, dans le cadre du PRV (« créance PRV »). La seconde créance est fondée sur un recours intenté par la Ville contre Groupe SM, en septembre 2018, dans lequel elle lui réclame plus de 14 millions de dollars au motif qu'il aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau (« créance relative au contrat des compteurs d'eau »).

[12] Vu le défaut de Groupe SM de rembourser la créance PRV et l'imminence de la vente de certains actifs à Thornhill, la Ville informe Groupe SM de son intention d'opérer compensation entre ce qu'elle lui doit et les créances ci-haut mentionnées, tout en précisant que ces créances ne peuvent être purgées ou compromises par la restructuration envisagée puisqu'elles découlent de la fraude et d'un détournement de fonds du Trésor public.

[13] En réponse, Deloitte demande un jugement déclaratoire portant que les sommes dues à Groupe SM par la Ville pour des travaux exécutés pour son bénéfice ne peuvent faire l'objet de compensation.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2019 QCCS 2316 (la juge Corriveau)*

[14] La juge surveillante accueille la demande en jugement déclaratoire de Deloitte et décide que la compensation pré-post ne peut s'opérer en faveur de la Ville. Même si, selon elle, la créance PRV est liée à une allégation de fraude non réfutée par Groupe SM, la juge surveillante conclut que, selon les enseignements de l'arrêt *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, la compensation pré-post n'est pas possible. Elle statue par ailleurs que la créance relative au contrat des compteurs d'eau n'est ni liquide ni exigible, de sorte que la compensation ne peut être opérée.

B. *Quebec Court of Appeal, 2020 QCCA 438 (Rochette and Healy J.J.A., Ruel J.A. Dissenting in Part)*

[15] Rochette J.A., writing for the majority, rejected the City’s argument regarding the VRP claim. Relying on *Kitco*, he reached the same conclusion as the supervising judge: that pre-post compensation could not be effected in this case. He also rejected the City’s argument that a claim relating to fraud falling within s. 19(2)(d) of the CCAA is an exception to the rule stated in that case. In any event, he expressed the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, Rochette J.A. added that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

[16] Ruel J.A., dissenting in part, agreed with his colleagues on the nature of the water meter contract claim. However, he was of the view that the VRP claim had to be presumed to fall within s. 19(2)(d) of the CCAA and that *Kitco* had to be distinguished on the basis that it had been rendered in a different context. In the final analysis, Ruel J.A. found that s. 19(2)(d) of the CCAA represents an exception to the principle established in that case and that it therefore allowed pre-post compensation between the two parties’ respective debts.

IV. Issues

[17] This appeal raises the following three questions:

1. Is the VRP claim a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA?
2. Does the CCAA permit compensation between a debt that arises before an initial order and one that arises after that order?
3. If compensation is permitted, should the City be authorized to withhold the payments owed

B. *Cour d’appel du Québec, 2020 QCCA 438 (les juges Rochette et Healy, le juge Ruel, dissident en partie)*

[15] Rédigeant pour la majorité, le juge Rochette rejette la prétention de la Ville relativement à la créance PRV. S’appuyant sur l’arrêt *Kitco*, il conclut, à l’instar de la juge surveillante, que la compensation pré-post ne peut s’opérer en l’espèce. En outre, il rejette l’argument de la Ville selon lequel une créance relative à la fraude visée par l’al. 19(2)d) de la LACC constitue une exception à la règle énoncée dans cet arrêt. Quoiqu’il en soit, il se dit d’avis que la Ville n’a pas prouvé que ses créances sont visées par cette disposition. Enfin, en ce qui concerne la créance relative au contrat des compteurs d’eau, le juge Rochette ajoute que les conditions de la compensation judiciaire ne sont pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration.

[16] Dissident en partie, le juge Ruel partage l’avis de ses collègues sur la nature de la créance relative au contrat des compteurs d’eau. Cependant, il est plutôt d’avis qu’il faut présumer que la créance PRV est visée par l’al. 19(2)d) de la LACC et que l’arrêt *Kitco* doit être distingué étant donné qu’il a été rendu dans un contexte différent. En dernière analyse, le juge Ruel estime que l’al. 19(2)d) de la LACC fait exception au principe établi dans cet arrêt et permet donc la compensation pré-post entre les dettes respectives des deux parties.

IV. Questions en litige

[17] Le présent pourvoi soulève les trois questions suivantes :

1. La créance PRV est-elle une réclamation se rapportant à une dette qui résulte de fraude aux termes de l’al. 19(2)d) de la LACC?
2. La LACC autorise-t-elle la compensation entre une dette née avant une ordonnance initiale et une dette née après cette ordonnance?
3. Si la compensation est permise, la Ville devrait-elle être autorisée à retenir les paiements dus

to SM Group until judgment is rendered in the case relating to the water meter contract?

[18] We will deal with these questions by considering each of the City's claims separately.

V. Analysis

[19] In essence, the City argues that the VRP claim cannot be dealt with by a compromise or arrangement because it relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA. According to the City, such a claim falls outside the absolute prohibition against pre-post compensation imposed by *Kitco*. The City also argues that the absolute nature of the *Kitco* rule is inconsistent with the broad discretion conferred on supervising judges by the CCAA. It submits that supervising judges can, in exercising their discretion, authorize pre-post compensation in appropriate circumstances. The exercise of this discretion is particularly appropriate where fraud is involved.

[20] For the reasons that follow, we are of the view that the VRP claim in this case is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA. We also conclude that a right to pre-post compensation, or set-off, invoked under the civil law or the common law can be stayed under ss. 11 and 11.02 of the CCAA. In our opinion, however, a supervising judge has the discretion to authorize pre-post compensation only in exceptional circumstances, given the high disruptive potential of this form of compensation. In this regard, the fact that the debt underlying a VRP claim is fraudulent, where this is shown, is a relevant factor in the exercise of the supervising judge's discretion. In this case, we find that it would not be appropriate to allow the City to effect compensation with respect to the VRP claim. Nor would it be appropriate to authorize the City to withhold the payments owed to SM Group pending the outcome of the case relating to the water meter contract.

à Groupe SM en attendant que jugement soit rendu dans le dossier relatif au contrat des compteurs d'eau?

[18] Nous traiterons de ces questions en abordant séparément chacune des créances invoquées par la Ville.

V. Analyse

[19] Essentiellement, la Ville soutient que la créance PRV est une réclamation qui ne peut être considérée dans le cadre d'une transaction ou d'un arrangement, puisqu'elle se rapporte à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la LACC. Selon la Ville, une telle réclamation échappe à l'interdiction absolue énoncée dans l'arrêt *Kitco* à l'égard de la compensation pré-post. La Ville plaide également que le caractère absolu de la règle de l'arrêt *Kitco* est incompatible avec le large pouvoir discrétionnaire conféré au juge surveillant par la LACC. La Ville estime que le juge surveillant peut, dans l'exercice de son pouvoir discrétionnaire, autoriser la compensation pré-post dans des circonstances appropriées. L'exercice de ce pouvoir est d'autant plus indiqué en présence de fraude.

[20] Pour les motifs qui suivent, nous sommes d'avis que la créance PRV visée en l'espèce n'est pas une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la LACC. Nous concluons par ailleurs que le droit à la compensation pré-post invoqué en vertu du droit civil ou de la common law peut être suspendu en application des art. 11 et 11.02 de la LACC. Toutefois, nous sommes d'avis que le juge surveillant possède le pouvoir discrétionnaire d'autoriser la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. À cet égard, le caractère frauduleux de la dette à l'origine d'une créance PRV, lorsque démontré, constitue un facteur pertinent dans l'exercice de la discrétion du juge surveillant. En l'espèce, nous estimons qu'il ne serait pas indiqué de permettre à la Ville d'opérer compensation en ce qui concerne la créance PRV. Il ne serait pas non plus approprié d'autoriser la Ville à retenir les paiements dus à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau.

A. *Voluntary Reimbursement Program Claim*

(1) Characterization of the Voluntary Reimbursement Program Claim

[21] We must begin by determining whether the VRP claim is a claim that relates to a fraudulent debt, because this is the premise behind the City's reasoning. For the reasons that follow, we conclude that this basic premise is not correct: the VRP claim is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA. The mere fact that a debtor company participated in the VRP is not sufficient to infer that the company defrauded a public body. In light of this conclusion, it is not necessary for us to deal with Deloitte's alternative argument that s. 19 of the CCAA is inapplicable in this case because there is no plan providing for a compromise or arrangement.

[22] The first step in characterizing the VRP claim is to distinguish, for the purposes of the CCAA, claims that are subject to a compromise or arrangement from those that are not. Section 19(1) of the CCAA sets out the general scheme governing claims that may be dealt with by a compromise or arrangement:

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of

A. *Créance du Programme de remboursement volontaire*

(1) Qualification de la créance du Programme de remboursement volontaire

[21] Il nous incombe de déterminer, d'entrée de jeu, si la créance PRV est une réclamation se rapportant à une dette frauduleuse, puisque cette prémisse explique le raisonnement de la Ville. Pour les motifs qui suivent, nous concluons que cette prémisse fondamentale n'est pas fondée : la créance PRV n'est pas une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la LACC. En effet, la seule participation au PRV par une société débitrice n'est pas suffisante pour inférer la commission d'une fraude par cette dernière à l'endroit d'un organisme public. Considérant cette conclusion, il n'est pas nécessaire de nous prononcer sur l'argument subsidiaire de Deloitte selon lequel l'art. 19 de la LACC serait inapplicable en l'espèce, en raison de l'absence de plan prévoyant une transaction ou un arrangement.

[22] Pour qualifier la créance PRV, il faut d'abord distinguer, au sens de la LACC, les réclamations compromises par la transaction ou l'arrangement de celles qui ne le sont pas. Le paragraphe 19(1) de cette loi énonce le régime général encadrant les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement :

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le

the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

[23] As an exception to this scheme, s. 19(2) of the CCAA provides that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud:

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

...

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; ...

[24] The burden of proof applicable to this scheme can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), which is analogous in every respect to s. 19(2)(d) of the CCAA. As this Court noted in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, these two statutes “for[m] part of an integrated body of insolvency law” (para. 78; see also 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522, at para. 74).

[25] To discharge its burden of proving that its claim relates to a debt “resulting from obtaining property or services by false pretences or fraudulent misrepresentation”, a creditor must establish, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the

consentement des inspecteurs visés à l’article 116 de la *Loi sur la faillite et l’insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l’acceptation de la transaction ou de l’arrangement, en raison d’une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l’autre.

[23] À titre d’exception à ce régime, le par. 19(2) de la LACC prévoit que certaines réclamations ne peuvent être compromises, notamment celles découlant de fraude :

(2) La réclamation se rapportant à l’une ou l’autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l’arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n’ait voté en faveur de la transaction ou de l’arrangement proposé :

...

d) toute dette ou obligation résultant de l’obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu’une dette ou obligation de la compagnie qui découle d’une réclamation relative à des capitaux propres;

[24] Pour déterminer le fardeau de preuve applicable à ce régime, il convient de se référer à la jurisprudence et à la doctrine portant sur l’al. 178(1)(e) de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, c. B-3 (« LFI »), lequel s’apparente en tous points à l’al. 19(2)(d) de la LACC. Comme notre Cour l’a souligné dans l’arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, ces deux lois « [font] partie d’un ensemble intégré de règles du droit de l’insolvabilité » (par. 78; voir aussi 9354-9186 *Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 74).

[25] Afin de satisfaire au fardeau qui lui incombe, c’est-à-dire démontrer que sa créance est une réclamation qui se rapporte à une dette « résultant de l’obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits », le créancier intéressé devra établir, par

creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service (*Léger v. Ouellet*, 2011 QCCA 1858, at para. 30 (CanLII); *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376, at para. 37 (CanLII); see also L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 3, at H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, at para. 28; J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at pp. 1001 and 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5th ed. 2016), at pp. 502-3). Once these elements have been proved, the creditor of a claim to which s. 19(2)(d) of the CCAA applies is in a better position than other ordinary creditors, insofar as such a claim, while not conferring secured creditor status, cannot be dealt with by a compromise or arrangement (see Houlden, Morawetz and Sarra, at H§63). This exception to the general scheme established by s. 19(1) of the CCAA must be interpreted narrowly (see, e.g., by analogy, *Lambert v. Macara*, [2004] R.J.Q. 2637 (C.A.), at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24).

[26] The City's burden was certainly not negligible: it had to prove that SM Group had knowingly made a false representation that led to the VRP claim. However, the City considered it sufficient for that purpose to mention that the claim existed, and did not try to prove or even allege any of these elements, presuming or assuming that the VRP claim resulted from fraudulent representations.

[27] As a result, the content of the VRP agreement, Bill 26 and the VRP Regulation must be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. In this regard, and for the reasons that follow, we agree with the

prépondérance des probabilités, les quatre éléments suivants : (i) le débiteur lui a fait une représentation; (ii) cette représentation était fausse; (iii) le débiteur savait que la représentation était fausse; (iv) cette fausse représentation a été faite dans le but d'obtenir un bien ou un service (*Léger c. Ouellet*, 2011 QCCA 1858, par. 30 (CanLII); *Dupuis c. Cernato Holdings Inc.*, 2019 QCCA 376, par. 37 (CanLII); voir aussi L. W. Houlden, G. B. Morawetz et J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4^e éd. rév. (feuilles mobiles)), vol. 3, H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, par. 28; J. P. Sarra, G. B. Morawetz et L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), p. 1001 et 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5^e éd. 2016), p. 502-503). Une fois ces éléments prouvés, le créancier d'une réclamation visée par l'al. 19(2)d) de la LACC bénéficie d'une position plus avantageuse que les autres créanciers ordinaires, dans la mesure où cette réclamation ne peut être compromise dans le cadre d'une transaction ou d'un arrangement, quoiqu'elle ne confère pas le statut de créancier garanti (voir Houlden, Morawetz et Sarra, H§63). Cette exception au régime général institué par le par. 19(1) de la LACC doit être interprétée restrictivement (voir notamment, par analogie, *Lambert c. Macara*, [2004] R.J.Q. 2637 (C.A.), par. 96; *Canada Mortgage and Housing Corp. c. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, par. 24).

[26] Le fardeau qui incombait à la Ville n'était certes pas négligeable. En effet, elle devait prouver que Groupe SM avait sciemment fait une fausse représentation ayant mené à la créance PRV. Toutefois, la Ville a estimé, aux fins de cette démonstration, qu'il suffisait de mentionner l'existence de cette créance, et n'a pas cherché à prouver ni même à alléguer l'un ou l'autre de ces éléments, présumant ou tenant pour acquis que la créance PRV découlait de représentations frauduleuses.

[27] En conséquence, pour déterminer si la créance PRV peut être considérée dans le cadre d'une transaction ou d'un arrangement, il est nécessaire d'interpréter le contenu de l'entente PRV, la Loi 26 ainsi que le règlement PRV. À cet égard, et pour les raisons

majority of the Court of Appeal that s. 19(2)(d) of the CCAA does not apply to the VRP claim.

[28] First, the content of the VRP agreement itself is a complete bar to the City's argument that participation in the program in itself justifies a finding that the City's claim results from SM Group's fraudulent activities. Because this confidential agreement entered into by the parties clearly stipulates that the amount fixed in the agreement can in no way be considered to constitute an admission of liability, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the CCAA. The onus was therefore on the City to prove, in accordance with the provisions of that statute, that SM Group had knowingly made a false representation to it in order to obtain property or a service.

[29] In this regard, there is, moreover, a well-established principle in the case law that a court must generally make its own findings of fact in applying s. 19(2)(d) (see Houlden, Morawetz and Sarra, at H§63). This is true, for example, even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings. It can be inferred by analogy from the case law on s. 178(1)(e) of the BIA that the courts have been particularly consistent and rigorous in assessing the evidence presented to them in this regard (see, e.g., *Terrain DEV Immobilier inc. v. Charron*, 2021 QCCA 417, at para. 2 (CanLII); *Dupuis*, at paras. 36-40; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164, at paras. 13-19 (CanLII); *Tavan v. Rostami*, 2014 QCCA 304, at paras. 3-6 (CanLII); *Léger*, at paras. 30-40; *Guilbert v. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, at paras. 20-25; *Sharma v. Sandhu*, 2019 MBQB 160, at paras. 38-45 (CanLII); *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719, at paras. 90-92 (CanLII); *Berger*, at paras. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (Ont. H.C.J.), at pp. 106-7, aff'd (1985), 53 C.B.R. (N.S.) 275 (C.A.); *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB

que nous expliquons ci-dessous, nous partageons les conclusions des juges majoritaires de la Cour d'appel : la créance PRV n'est pas visée par l'al. 19(2)d) de la LACC.

[28] En premier lieu, le contenu même de l'entente PRV constitue un obstacle dirimant à la prétention de la Ville selon laquelle le seul fait de la participation à ce programme suffit pour conclure que sa créance résulte des activités frauduleuses de Groupe SM. En effet, comme il est clairement stipulé dans cette entente confidentielle intervenue entre les parties que la somme convenue dans celle-ci ne peut en aucun cas être assimilée à une admission de responsabilité, on ne saurait présumer que la créance PRV constitue une réclamation visée à l'al. 19(2)d) de la LACC. En conséquence, il incombait à la Ville de prouver, conformément aux dispositions de cette loi, que Groupe SM lui avait faussement et sciemment fait une représentation afin d'obtenir un bien ou un service.

[29] D'ailleurs, en cette matière, une règle jurisprudentielle bien établie veut qu'un tribunal tire généralement ses propres conclusions factuelles aux fins d'application de l'al. 19(2)d) (voir Houlden, Morawetz et Sarra, H§63). Il en est ainsi, notamment, malgré la présence de conclusions liées possiblement à la fraude prononcées dans le cadre d'un procès antérieur, ou encore lorsqu'un jugement par défaut ou un acquiescement à jugement contiendrait de telles conclusions. La jurisprudence portant sur l'al. 178(1)e) de la LFI permet d'inférer, par analogie, que les tribunaux se montrent particulièrement constants et rigoureux dans l'appréciation de la preuve qui leur est présentée à cet égard (voir notamment *Terrain DEV Immobilier inc. c. Charron*, 2021 QCCA 417, par. 2 (CanLII); *Dupuis*, par. 36-40; *Pelletier c. CAE Rive-Nord*, 2019 QCCA 2164, par. 13-19 (CanLII); *Tavan c. Rostami*, 2014 QCCA 304, par. 3-6 (CanLII); *Léger*, par. 30-40; *Guilbert c. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, par. 20-25; *Sharma c. Sandhu*, 2019 MBQB 160, par. 38-45 (CanLII); *Royal Bank of Canada c. Hejna*, 2013 ONSC 1719, par. 90-92 (CanLII); *Berger*, par. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (H.C.J. Ont.), p. 106-107, conf. par (1985), 53 C.B.R. (N.S.) 275 (C.A.);

183, 58 C.B.R. (5th) 301, at paras. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, at paras. 37-63; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261, at paras. 30-48 (CanLII); *Johnson v. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, at paras. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, at paras. 53-58).

[30] Second, Bill 26 and the VRP Regulation published in the *Gazette officielle du Québec* pursuant to ss. 3 and 4 of that statute do not provide any greater support for the City’s position. We agree with the majority of the Court of Appeal, who rejected the idea of a statutory presumption or a presumption of fact that a debtor made fraudulent representations based solely on the fact that it participated in the VRP. That scheme, which was in effect from November 2015 to December 2017, created no such presumption.

[31] The purpose of the VRP as defined in s. 3 of Bill 26 — in Chapter II, entitled “Reimbursement Program” — supports this conclusion:

3. The Minister publishes in the *Gazette officielle du Québec* a voluntary, fixed-term reimbursement program to make it possible for an enterprise or a natural person mentioned in section 10 to reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics.

[32] The use of the words “may have been” in the phrase “there may have been fraud or fraudulent tactics” clearly contradicts the City’s argument. Moreover, the same words are also used in s. 1 of the VRP Regulation in describing the purpose of that program:

1. The Voluntary Reimbursement Program makes it possible for every natural person and every enterprise to reimburse certain amounts improperly paid by a public body in the course of the tendering, awarding or management of a public contract entered into after 1 October 1996 in relation to which there may have been fraud or fraudulent tactics.

Agriculture Financial Services Corp. c. Zaborski, 2009 ABQB 183, 58 C.B.R. (5th) 301, par. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, par. 37-63; *The Toronto-Dominion Bank c. Merenick*, 2007 BCSC 1261, par. 30-48 (CanLII); *Johnson c. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, par. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, par. 53-58).

[30] En deuxième lieu, la Loi 26, tout comme le règlement PRV publié dans la *Gazette officielle du Québec* en vertu des art. 3 et 4 de cette loi, n’appuient pas davantage la thèse de la Ville. Nous partageons l’avis des juges majoritaires de la Cour d’appel, qui rejettent l’idée d’une présomption légale ou factuelle de l’existence de représentations frauduleuses de la part d’un débiteur du seul fait de sa participation au PRV. Ce régime, qui a été en vigueur de novembre 2015 à décembre 2017, n’a pas créé une telle présomption.

[31] En effet, l’objet du PRV tel qu’il est défini à l’art. 3 de la Loi 26, au chapitre II intitulé « Programme de remboursement », étaye cette conclusion :

3. Le ministre publie à la *Gazette officielle du Québec* un programme de remboursement volontaire à durée déterminée afin qu’une entreprise ou une personne physique mentionnée à l’article 10 puisse rembourser certaines sommes payées injustement dans le cadre de l’adjudication, de l’attribution ou de la gestion d’un contrat public et pour lequel il aurait pu y avoir fraude ou manœuvre dolosive.

[32] L’emploi du conditionnel dans l’expression « il aurait pu y avoir fraude ou manœuvre dolosive » contredit clairement la thèse avancée par la Ville. De plus, le conditionnel est également utilisé à l’art. 1 du règlement PRV pour décrire l’objet de ce programme :

1. Le Programme de remboursement volontaire permet à toute personne physique et à toute entreprise de rembourser certaines sommes payées injustement par un organisme public dans le cadre de l’adjudication, de l’attribution ou de la gestion d’un contrat public, conclu après le 1^{er} octobre 1996, et pour lequel il aurait pu y avoir fraude ou ma[n]œuvre dolosive.

[33] The fact that fraud is characterized as a possibility rather than a certainty is by no means surprising. Given the VRP's purpose of recovering amounts paid improperly by public bodies, it stands to reason that Bill 26 does not provide for any mechanism to determine whether amounts agreed to under the VRP are in fact related, in whole or in part, to fraud. Section 7 of the VRP Regulation supports this point, since it states the following:

7. The fact that a natural person or an enterprise participates in the Program does not constitute an admission of liability or of a fault committed by the natural person or enterprise.

[34] The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8:

8. Every natural person or enterprise participating in the Program acknowledges that revealing information or sending documents within the Program framework does not restrict in any manner whatever a public body's capacity to bring civil proceedings against the natural person or enterprise in relation to public contracts for which a settlement has not been reached under the Program or to which the Act does not apply.

Every natural person or enterprise acknowledges that participation in the Program and the conclusion of an agreement under it in no manner protects the natural person or enterprise, or its officers, against any penal or criminal proceedings that have been or may be brought in connection with public contracts entered into by the natural person or enterprise.

[35] Evidence that a natural person or enterprise participated in the VRP therefore cannot on its own justify characterizing a claim as being related to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA.

[33] Que la fraude soit caractérisée comme une éventualité, par opposition à quelque chose de certain, n'a rien de surprenant. En effet, comme l'objectif du PRV consiste à récupérer des sommes payées injustement par des organismes publics, il va de soi que la Loi 26 ne prévoit aucun mécanisme pour déterminer si, dans les faits, les sommes convenues dans le cadre du PRV sont reliées, en partie ou en totalité, à une fraude. L'article 7 du règlement PRV appuie ce constat, puisqu'il précise ce qui suit :

7. Le fait pour une personne physique ou une entreprise de se prévaloir du Programme ne constitue pas une reconnaissance de responsabilité ni une admission qu'elle a commis une faute.

[34] La faute dont il est question à l'art. 7 relève de la responsabilité civile et se limite au contrat public visé par l'entente PRV. Lorsque le législateur entend faire référence à des procédures de nature pénale ou criminelle, ou encore à des recours civils se situant hors du champ de l'entente PRV, il le fait expressément. L'article 7 du règlement PRV, lu conjointement avec l'art. 8, confirme cette interprétation :

8. Toute personne physique ou entreprise qui se prévaut du Programme reconnaît que le fait qu'elle révèle des informations ou transmette des documents dans ce cadre n'a pas pour effet de limiter, de quelque façon que ce soit, la capacité d'un organisme public d'entreprendre contre elle tout recours civil concernant des contrats publics qui n'auront pas fait l'objet d'un règlement dans le cadre du Programme ou qui ne sont pas visés par la Loi.

De plus, toute personne physique ou entreprise reconnaît que sa participation au Programme, et la conclusion d'une entente en vertu de celui-ci, ne la protège, ni ses dirigeants, d'aucune façon de poursuites pénales et/ou criminelles qui ont été ou pourraient être intentées contre elle à l'égard de contrats publics qu'elle a conclus.

[35] En conséquence, la seule preuve qu'une personne physique ou une entreprise a participé au PRV ne saurait à elle seule permettre de qualifier une créance de réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la LACC.

[36] However, the City submits that reading ss. 1, 3 and 10 of Bill 26 together leads to an entirely different conclusion, namely that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. In our view, the City is wrong.

[37] It is true that s. 1 of Bill 26 does not refer to fraud as being hypothetical:

1. This Act provides for exceptional measures for the reimbursement and recovery of amounts improperly paid as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of public contracts.

As we saw above, however, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: there is no question that, unlike s. 1 of Bill 26, which sets out the purpose of that statute generally, the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. In addition, the City's interpretation cannot be reconciled with ss. 7 and 8 of the VRP Regulation, which are reproduced above.

[38] That being said, the City points out that s. 3 of Bill 26 refers to s. 10, which specifically states that fraud was committed:

10. Any enterprise or natural person who has, in any capacity, participated in fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract is presumed to have caused injury to the public body concerned.

In such a case, the officers of the enterprise in office at the time the fraud or fraudulent tactics occurred are held liable unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.

The directors of the enterprise in office at the time the fraud or fraudulent tactics occurred are also held liable if it is established that they knew or ought to have known that fraud or fraudulent tactics were committed in relation to the contract concerned, unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.

[36] Cependant, la Ville soutient qu'une lecture conjointe des art. 1, 3 et 10 de la Loi 26 mène à une toute autre conclusion, à savoir que la personne physique ou l'entreprise qui participe au PRV a nécessairement fraudé un organisme public. Nous sommes d'avis qu'elle a tort.

[37] Il est vrai que l'art. 1 de la Loi 26 ne traite pas de la fraude à titre hypothétique :

1. La présente loi prévoit des mesures exceptionnelles adaptées au remboursement et au recouvrement de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de l'adjudication, de l'attribution ou de la gestion de contrats publics.

Toutefois, comme nous l'avons vu précédemment, l'art. 3 de la Loi 26 et l'art. 1 du règlement PRV sont clairs : il est acquis que, contrairement à l'art. 1 de la Loi 26, qui énonce l'objet de cette loi de manière générale, les dispositions substantielles de la Loi 26 et du règlement PRV ne considèrent la fraude que de façon hypothétique. L'interprétation de la Ville est également inconciliable avec les art. 7 et 8 du règlement PRV, qui sont reproduits plus haut.

[38] Cela dit, la Ville fait remarquer que l'art. 3 de la Loi 26 renvoie à l'art. 10 lequel énonce explicitement qu'une fraude a été commise :

10. Toute entreprise ou toute personne physique qui, à quelque titre que ce soit, a participé à une fraude ou à une manœuvre dolosive dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public est présumée avoir causé un préjudice à l'organisme public concerné.

Le cas échéant, la responsabilité de ses dirigeants en fonction au moment de la fraude ou de la manœuvre dolosive est engagée, à moins qu'ils ne démontrent avoir agi avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

La responsabilité des administrateurs de l'entreprise en fonction au moment de la fraude ou de la manœuvre dolosive est également engagée s'il est établi qu'ils savaient ou qu'ils auraient dû savoir qu'une fraude ou une manœuvre dolosive a été commise relativement au contrat visé, à moins qu'ils ne démontrent avoir agi avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

The enterprises and natural persons referred to in this section are solidarily liable for the injury caused, unless such liability is waived by the public body.

[39] We do not agree with the City’s interpretation on this point. It is up to the courts to conclude that fraud of this kind has been committed. More precisely, we are of the view that the City is confusing two schemes created by Bill 26: one — the VRP (ss. 3 to 9) — introduced by Chapter II and the other by Chapter III, which is entitled “Special Rules Applicable to Judicial Proceedings” (ss. 10 to 17). The first scheme was designed to encourage — for a two-year period — natural persons or enterprises fearing that a public body would bring civil proceedings against them to participate in the VRP with a view to entering into an agreement through a completely confidential process (s. 7 of Bill 26; s. 4 of the VRP Regulation). It was only once the first scheme ended that the second, one of an entirely different nature, took effect.

[40] The scheme provided for in ss. 10 to 17 of Bill 26 is one that deviates from the general law. It applies to judicial proceedings brought by a public body, or by the Minister of Justice on behalf of a public body, against a natural person or enterprise that allegedly participated in fraud in relation to a public contract. When a court allows such an action, not only can it assume that the defendant caused injury to the public body through its fraudulent act (s. 10 para. 1), but in addition, “[t]he injury is presumed to correspond to the amount claimed by the public body concerned for the contract concerned if the amount does not exceed 20% of the total amount paid for that contract” (s. 11 para. 1). The enterprises and natural persons contemplated by the statute are solidarily liable for such injury (s. 10 para. 4). An amount granted “bears interest from the date the work is accepted by the public body concerned for the contract concerned” (s. 11 para. 3). As well, the court “must add a lump sum equal to 20% of any amount granted for injury, to cover expenses incurred for the purposes of th[e] Act” (s. 14).

Les entreprises et les personnes physiques visées au présent article sont solidairement responsables du préjudice causé, à moins que l’organisme public n’y renonce.

[39] Nous ne partageons pas cette interprétation de la Ville. Il appartient aux tribunaux de conclure qu’une fraude de cette nature a été commise. Plus précisément, nous estimons que la Ville confond deux régimes créés par la Loi 26 : l’un introduit par le chapitre II — le PRV — (art. 3 à 9), l’autre par le chapitre III intitulé « Règles particulières applicables aux recours judiciaires » (art. 10 à 17). Le premier régime a été conçu afin d’inciter, pendant une période de deux ans, les personnes physiques ou les entreprises craignant qu’un organisme public introduise contre elles une poursuite civile à participer au PRV dans le but de conclure une entente en toute confidentialité (art. 7 de la Loi 26; art. 4 du règlement PRV). Or, ce n’est qu’une fois que le premier régime prend fin que le second entre en vigueur, lequel est d’une toute autre nature.

[40] Le régime prévu aux art. 10 à 17 de la Loi 26 est un régime exorbitant du droit commun, applicable aux recours judiciaires intentés par un organisme public ou le ministre de la Justice, pour le compte d’un organisme public, contre une personne physique ou une entreprise qui aurait participé à une fraude visant un contrat public. Lorsqu’un tel recours est accueilli, non seulement le tribunal peut-il tenir pour acquis que le défendeur a causé par son acte frauduleux un préjudice à l’organisme public (art. 10 al. 1), mais aussi que « [c]e préjudice est présumé correspondre à la somme réclamée par l’organisme public concerné pour le contrat visé lorsque cette somme ne représente pas plus de 20 % du montant total payé pour le contrat visé » (art. 11 al. 1), préjudice pour lequel les entreprises et les personnes physiques visées par la loi sont solidairement responsables (art. 10 al. 4). La somme accordée « porte intérêt à compter de la réception de l’ouvrage par l’organisme public concerné pour le contrat visé » (art. 11 al. 3). De même, le tribunal « doit ajouter à la somme qu’il accorde en réparation du préjudice un montant forfaitaire égal à 20 % de cette somme à titre de frais engagés pour l’application de la [. . .] loi » (art. 14).

[41] In other words, these provisions are designed to make it easier to prove causation and injury when such a proceeding is brought, but it should be noted that they are of no effect if a court finds that the evidence of fraud is insufficient; as well, and most importantly, they in no way make it easier to prove such a fault. Section 10 of Bill 26 is therefore of no assistance to the City, which in any event has not sought to show, on any basis other than the mere existence of the VRP agreement, that SM Group took part in fraud in connection with a contract the City awarded to it. The schemes created by Bill 26 suggest that a court will recognize the existence of fraud only under the Chapter III scheme. Moreover, it appears that the reference to s. 10 in s. 3 merely serves to specify the natural persons to whom the VRP applies, namely directors and officers of enterprises.

[42] Lastly, it should be mentioned that it can easily be imagined that an enterprise that entered into a potentially contentious public contract with a public body would make the strategic choice to participate in the VRP out of fear of bad publicity or to avoid exposing itself to the exceptional scheme of Chapter III of Bill 26, the result of which, if the proceeding were decided in the public body's favour, would likely be significant additional financial liability for the enterprise on top of the legal fees it would have to pay.

[43] In sum, neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act; nor does the VRP agreement constitute a serious, precise and concordant presumption of fact (art. 2849 of the *Civil Code of Québec*). It follows that the City has not shown that the VRP claim falls within s. 19(2)(d) of the CCAA.

(2) Compensation Between Debts Arising Before and After an Initial Order (Pre-post Compensation)

[44] The bankruptcy of large companies often resulted in “the entire disruption of the corporation,

[41] Autrement dit, ces dispositions visent à faciliter la preuve du lien de causalité et du préjudice lorsqu'un tel recours est intenté, mais, faut-il le souligner, elles demeurent sans effet dans l'éventualité où un tribunal judiciaire conclut que la preuve relative à la fraude s'avère insuffisante; aussi, et surtout, elles ne facilitent en aucun cas la preuve d'une telle faute. Partant, l'art. 10 de la Loi 26 n'est d'aucun secours pour la Ville, qui, de toute manière, n'a pas cherché à démontrer, autrement qu'en invoquant la seule existence de l'entente PRV, que Groupe SM a participé à une fraude dans le cadre d'un contrat qu'elle lui a octroyé. À en juger par les régimes mis en œuvre par cette loi, la reconnaissance judiciaire de l'existence d'une fraude n'intervient que dans le régime propre au chapitre III de celle-ci. De plus, il appert que le renvoi à l'art. 10 dans l'art. 3 ne sert qu'à préciser quelles sont les personnes physiques visées par le PRV, en l'occurrence les administrateurs et dirigeants des entreprises.

[42] En dernier lieu, il convient de souligner qu'il est facile d'imaginer qu'une entreprise ayant conclu un contrat public possiblement litigieux avec un organisme public fasse le choix stratégique de participer au PRV par crainte de mauvaise publicité ou encore pour éviter de s'exposer au régime exorbitant prévu au chapitre III de la Loi 26, lequel serait susceptible d'emporter pour elle, si le recours était accueilli en faveur de l'organisme, une responsabilité financière additionnelle non négligeable, en sus des frais juridiques qu'elle aurait à déboursier.

[43] En somme, ni le contenu de l'entente PRV ni le cadre juridique qui lui est propre ne permettent de présumer que Groupe SM a admis avoir commis un acte frauduleux, pas plus que l'entente PRV ne constitue une présomption de fait grave, précise et concordante (art. 2849 du *Code civil du Québec*). Il s'ensuit que la Ville n'a pas démontré que la créance PRV relevait de l'al. 19(2)d) de la LACC.

(2) Compensation entre des dettes nées avant et après le prononcé de l'ordonnance initiale (compensation pré-post)

[44] La mise en faillite des grandes compagnies a fréquemment mené à [TRADUCTION] « la

loss of goodwill, and sale of assets on a discounted basis” (J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed. 2013), at pp. 22-23; see also *Century Services*, at para. 16). Parliament, wishing to protect the survivability of such companies, which are essential to economic prosperity and to a high rate of employment, therefore set up a restructuring process in the CCAA that was designed to prevent them from being dismantled and having their assets liquidated at a discount (*Century Services*, at paras. 17-18 and 70; *Callidus*, at paras. 41-42).

[45] Initially, restructuring under the CCAA was done through a plan of arrangement or compromise negotiated between the debtor company and its creditors that averted the company’s bankruptcy by allowing it to adjust its debts and reorganize its business (S. E. Edwards, “Reorganizations Under the Companies’ Creditors Arrangement Act” (1947), 25 *Can. Bar Rev.* 587, at pp. 588-90 and 592). Later, liquidation under the CCAA emerged as a practice. Liquidation can also serve as a tool for restructuring a struggling business “by allowing the business to survive, albeit under a different corporate form or ownership” (*Callidus*, at para. 45; see also Sarra, at p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311).

[46] The primary tool that allows the CCAA to achieve its restructuring objective is a stay of proceedings and of creditors’ rights (Sarra, at pp. 17 and 52; McElcheran, at p. 5). The direct effect of a stay is that it creates a status quo period that stabilizes the debtor company’s situation by shielding it from its creditors while the restructuring process is under way (*Century Services*, at para. 60; see also *Kitco*, at para. 43 (CanLII)). Without such a period, there would be a free-for-all in which individual creditors would fight it out to enforce their rights without regard for the company’s survival or the maximization of its liquidation value (*Century Services*, at para. 22).

[47] During the status quo period, the debtor company can therefore continue operating without fear of being driven into bankruptcy by its creditors. This

perturbation complète des activités de l’entreprise, à la perte de sa clientèle et à la vente à rabais de son actif » (J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2^e éd. 2013), p. 22-23; voir aussi *Century Services*, par. 16). Le législateur, soucieux de protéger la capacité de survie de ces compagnies essentielles à la prospérité économique et à un taux d’emploi élevé, a donc mis en place dans la LACC un processus de restructuration destiné à éviter leur démantèlement et la liquidation à rabais de leurs actifs (*Century Services*, par. 17-18 et 70; *Callidus*, par. 41-42).

[45] Initialement, la restructuration sous le régime de la LACC se faisait au moyen d’un plan d’arrangement ou de transaction négocié entre la compagnie débitrice et ses créanciers qui évitait sa mise en faillite en lui permettant de rajuster ses dettes et de réorganiser ses affaires (S. E. Edwards, « Reorganizations Under the Companies’ Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 588-590 et 592). Puis a émergé, en application de la LACC, une pratique de liquidation qui peut elle aussi constituer un outil de restructuration de l’entreprise en difficulté « en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents » (*Callidus*, par. 45; voir aussi Sarra, p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4^e éd. 2019), p. 311).

[46] L’instrument principal qui permet à la LACC de réaliser son objectif de restructuration est la suspension des procédures et des droits des créanciers (Sarra, p. 17 et 52; McElcheran, p. 5). L’effet direct de la suspension est qu’elle instaure une période de statu quo qui stabilise la situation de la compagnie débitrice en la mettant à l’abri de ses créanciers pendant que la restructuration suit son cours (*Century Services*, par. 60; voir aussi *Kitco*, par. 43). L’absence d’une telle période entraînerait une situation anarchique où chaque créancier se battraient pour faire valoir ses droits, sans égard à la survie de l’entreprise ou à la maximisation de sa valeur de liquidation (*Century Services*, par. 22).

[47] Durant cette période, la compagnie débitrice peut donc poursuivre ses activités sans craindre d’être poussée à la faillite par ses créanciers. Ce

temporary respite creates an environment conducive to fair negotiations between the various stakeholders and gives the debtor the necessary time to prepare a plan of compromise or arrangement ensuring its survival, or to take steps to maximize the value of the business it operates with a view to its liquidation under the CCAA (*Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (Q.B.), at para. 15; *Kitco*, at para. 43; *Callidus*, at paras. 40 and 46).

[48] The fundamental feature of the CCAA is a grant to the courts that apply it of a broad discretion to make any orders needed to ensure that restructuring is successful and that the CCAA's objectives are achieved (*Century Services*, at para. 19). The true “engine” driving the statutory scheme (*Callidus*, at para. 48, citing *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36), this judicial discretion also plays a prominent part in stays of proceedings.

[49] In principle, a court may deny a stay application. Such applications are rarely denied, however, to the point where the terms “initial order” and “stay order” have, in practice, become interchangeable (*Sarra*, at p. 51). Stays are in fact requested and granted systematically, other than in certain exceptional cases (p. 51).

[50] A stay is a temporary measure, however; once it has been lifted, creditors regain their ability to fully exercise their rights and remedies (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, at paras. 9 and 14). On an initial application in respect of a debtor company, a court may include in its initial order a first stay period of no more than 10 days (s. 11.02(1) of the CCAA). After that, the court may renew the stay for any period it considers necessary (s. 11.02(2) of the CCAA). When a stay is renewed, or at any other time in the course of the proceedings, an interested creditor may, in accordance with the procedure set out in the initial order, apply to the court to lift a stay affecting any of its rights or remedies (*Sarra*, at pp. 58-60 and 88; see also *Muscletech Research & Development Inc., Re*

moment de répit crée un environnement propice à une négociation équitable entre les différentes parties prenantes, en plus d’offrir à la débitrice le temps nécessaire pour préparer un plan de transaction ou d’arrangement assurant sa survie ou pour prendre des mesures maximisant la valeur de l’entreprise qu’elle exploite en vue de sa liquidation en vertu de la LACC (*Meridian Developments Inc. c. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (B.R.), par. 15; *Kitco*, par. 43; *Callidus*, par. 40 et 46).

[48] La caractéristique fondamentale de la LACC est l’attribution au tribunal chargé de son application d’un vaste pouvoir discrétionnaire lui permettant de rendre les ordonnances nécessaires pour mener à bon port la restructuration et atteindre les objectifs de la LACC (*Century Services*, par. 19). Véritable « moteur » du régime législatif (*Callidus*, par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36), ce pouvoir discrétionnaire du tribunal joue également un rôle de premier plan dans le cadre de la suspension des procédures.

[49] En principe, le tribunal peut refuser une demande de suspension. Ces demandes sont toutefois rarement refusées, à tel point que les termes « ordonnance initiale » et « ordonnance de suspension » sont devenus, en pratique, interchangeables (*Sarra*, p. 51). La suspension est en effet demandée et accordée systématiquement, si ce n’est dans certains cas exceptionnels (p. 51).

[50] La suspension est cependant une mesure temporaire; une fois levée, les créanciers retrouvent la capacité d’exercer pleinement leurs droits et recours (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, par. 9 et 14). Dans le cas d’une demande initiale visant une compagnie débitrice, le tribunal peut assortir son ordonnance initiale d’une première période de suspension d’une durée maximale de 10 jours (par. 11.02(1) de la LACC). Par la suite, la suspension peut être renouvelée par le tribunal pour la période qu’il estime nécessaire (par. 11.02(2) de la LACC). Au moment du renouvellement de la suspension, ou à tout autre moment au cours des procédures, un créancier intéressé peut, conformément à la procédure prévue à cet effet dans l’ordonnance initiale, demander au tribunal de lever

(2006), 19 C.B.R. (5th) 54 (Ont. S.C.J.), at para. 5; *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, at paras. 7-8 and 14-15).

[51] While it is true that the *BIA* and the *CCAA* form part of an integrated body of insolvency law, there are nonetheless some fundamental differences between the two schemes (*Century Services*, at para. 78). Unlike the *BIA*, the *CCAA* gives courts a broad discretion to decide whether a stay is appropriate, to determine how long it should last and to adjust its scope depending on what is needed to restructure the debtor company and to achieve the objectives of the *CCAA*. In this regard, the *CCAA* has been described as a “skeletal” statute that does not contain “a comprehensive code that lays out all that is permitted or barred” (*Century Services*, at para. 57, quoting *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44).

[52] To fully understand the rights and restrictions applicable in a given case, it is therefore not enough to read the legislation; it is also important to consider the court’s exercise of its discretion, which is reflected in all of the many orders made throughout the proceedings.

[53] The question raised by this appeal is therefore whether a court’s discretion allows it to stay a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law and, by extension, to authorize pre-post compensation in appropriate cases.

(a) *Power to Grant and Lift a Stay of the Right to Pre-post Compensation*

[54] In our view, the broad discretion conferred on a court by ss. 11 and 11.02 of the *CCAA* allows it to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process.

la suspension affectant l’un de ses droits ou recours (Sarrazin, p. 58-60 et 88; voir aussi *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (C.S.J. Ont.), par. 5; *Parc industriel Laprade inc. c. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, par. 7-8 et 14-15).

[51] Bien que la *LFI* et la *LACC* fassent partie d’un ensemble intégré de règles du droit de l’insolvabilité, il existe tout de même des différences fondamentales entre les deux régimes (*Century Services*, par. 78). En effet, contrairement à ce qui prévaut sous la *LFI*, la *LACC* confère au tribunal un large pouvoir discrétionnaire lui permettant de décider de l’opportunité d’une suspension, de déterminer la durée de celle-ci et d’en ajuster la portée selon les besoins de la restructuration et selon ce qui est nécessaire pour réaliser les objectifs de la *LACC*. En ce sens, la *LACC* a été décrite comme une loi [TRADUCTION] « schématique » ne contenant « pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Century Services*, par. 57, citant *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44).

[52] Pour bien saisir les droits et restrictions applicables dans un cas donné, il ne suffit donc pas de lire la loi; il faut également se pencher sur l’exercice par le tribunal de son pouvoir discrétionnaire, lequel se manifeste dans toute la multitude d’ordonnances rendues tout au long des procédures.

[53] La question que soulève le présent pourvoi consiste donc à déterminer si le pouvoir discrétionnaire dont dispose le tribunal lui permet de suspendre le droit d’opérer compensation pré-post qu’invoque un créancier en vertu du droit civil ou de la common law et, corollairement, d’autoriser la compensation pré-post dans les cas qui s’y prêtent.

a) *Pouvoir d’accorder et de lever une suspension du droit à la compensation pré-post*

[54] Nous sommes d’avis que le vaste pouvoir discrétionnaire conféré au tribunal par les art. 11 et 11.02 de la *LACC* permet à celui-ci de suspendre des droits reconnus aux créanciers mais dont l’exercice

This includes a creditor's right to effect pre-post compensation.

[55] Under s. 11.02 of the CCAA, a court may stay any action, suit or other proceeding that might be brought against the debtor company. Despite the language of s. 11.02, which at first glance limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order (see *Meridian*, at para. 26; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), at pp. 113-14; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, at paras. 31-33; McElcheran, at pp. 135 and 245-46; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 363). For example, in *Quintette Coal*, the British Columbia Court of Appeal concluded that a creditor's right to pre-post set-off can be stayed just like any other enforcement measure with a high disruptive potential (see also *Associated Investors of Canada Ltd. (Manager of) v. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), at paras. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 13-16, aff'd 2015 BCCA 426, 378 B.C.A.C. 116, at paras. 28-30). In our view, this interpretation is the correct one, as it advances the CCAA's remedial objectives and is consistent with its scheme.

[56] It can also be seen from the various model initial orders adopted by the country's superior courts that prohibitions against setting off debts are standard practice, and in the vast majority of cases take effect as soon as an initial order is made (see Court of Queen's Bench of Alberta, *Alberta Template CCAA Initial Order*, January 2019 (online), at paras. 14 and 16; Supreme Court of British Columbia, *Model CCAA Initial Order*, August 1, 2015 (online), at paras. 16 and 18; Ontario Superior Court of Justice, Commercial List, *Initial Order*, January 21, 2014 (online), at paras. 15-16; Superior Court of Quebec, Commercial Division, *Initial Order*, May 2014 (online), at paras. 10 and 12; Court of Queen's Bench for

serait susceptible de mettre en péril la restructuration, y compris le droit d'opérer compensation pré-post.

[55] L'article 11.02 de la LACC permet de suspendre toute action, poursuite ou autre procédure pouvant être intentée contre la compagnie débitrice. Malgré le texte de l'art. 11.02, qui limite à première vue aux procédures judiciaires l'application du pouvoir de suspension, la jurisprudence interprète de manière large et libérale l'étendue des droits et recours susceptibles d'être inclus dans une ordonnance de suspension (voir *Meridian*, par. 26; *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), p. 113-114; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, par. 31-33; McElcheran, p. 135 et 245-246; R. J. Wood, *Bankruptcy and Insolvency Law* (2^e éd. 2015), p. 363). À titre d'exemple, dans l'arrêt *Quintette Coal*, la Cour d'appel de la Colombie-Britannique a conclu que le droit d'un créancier d'opérer compensation pré-post pouvait être suspendu au même titre que toute autre mesure d'exécution possédant un fort potentiel perturbateur (voir aussi *Associated Investors of Canada Ltd. (Manager of) c. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), par. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, par. 13-16, conf. par 2015 BCCA 426, 378 B.C.A.C. 116, par. 28-30). Selon nous, cette interprétation est la bonne, puisqu'elle favorise les objectifs réparateurs de la LACC, en plus d'être cohérente avec l'économie de cette loi.

[56] À la lumière des divers modèles d'ordonnances initiales adoptés par les cours supérieures du pays, on constate d'ailleurs que l'interdiction d'opérer compensation entre des dettes est pratique courante et que, dans la très vaste majorité des cas, une telle interdiction entre en vigueur dès le prononcé de l'ordonnance initiale (voir Cour du Banc de la Reine de l'Alberta, *Alberta Template CCAA Initial Order*, janvier 2019 (en ligne), par. 14 et 16; Cour suprême de la Colombie-Britannique, *Model CCAA Initial Order*, 1^{er} août 2015 (en ligne), par. 16 et 18; Cour supérieure de justice de l'Ontario, rôle des affaires commerciales, *Ordonnance initiale*, 21 janvier 2014 (en ligne), par. 15-16; Cour supérieure du Québec,

Saskatchewan, *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (online), at paras. 15-16).

[57] A court's discretion is therefore broad enough to allow it to stay the right of creditors to effect pre-post compensation. In such a case, the prohibition against pre-post compensation flows directly from the stay order. Conversely, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. On this point, we reject the absolute prohibition proposed by the Quebec Court of Appeal in *Kitco*, because we conclude that a court has the discretion to allow pre-post compensation in appropriate cases.

[58] The instances in which a court should not stay the right to effect pre-post compensation in an initial order will be rare, however. It must be borne in mind that a supervising judge's discretion, although broad, is not boundless. It must be exercised in furtherance of the CCAA's remedial objectives (*Callidus*, at para. 49).

[59] The status quo period could be rendered pointless if creditors were allowed to effect pre-post compensation without restraint (see *Kitco*, at paras. 20 and 43). *Tungsten*, in which the court stayed pre-post set-off, provides a good example of the disruptive potential of this form of set-off (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 ("*Tungsten* (S.C.)"), at para. 32, aff'd 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 16, 20 and 25, and 2015 BCCA 426, 378 B.C.A.C. 116, at para. 29). If a creditor could rely on compensation to refuse to pay for goods or services supplied by the debtor during the status quo period, the restructuring could be torpedoed. The debtor would have a disincentive to provide its creditors with goods and services because it would fear not being paid for them; it would then be deprived of the funds needed to continue

Chambre commerciale, *Ordonnance initiale*, mai 2014 (en ligne), par. 10 et 12; Cour du Banc de la Reine de la Saskatchewan, *Saskatchewan Template CCAA Initial Order*, 6 décembre 2017 (en ligne), par. 15-16).

[57] Le pouvoir discrétionnaire dont dispose le tribunal est donc suffisamment large pour lui permettre de suspendre le droit des créanciers d'opérer compensation pré-post. Dans un tel cas, l'interdiction d'opérer compensation pré-post découle directement de l'ordonnance de suspension. En revanche, le tribunal peut à sa discrétion refuser d'imposer une telle interdiction ou, si la compensation pré-post a été suspendue par l'ordonnance, lever cette suspension par la suite pour permettre à un créancier intéressé de faire valoir ses droits. Sur ce point, nous écartons l'interdiction absolue proposée par la Cour d'appel du Québec dans l'arrêt *Kitco*, puisque nous concluons que le tribunal possède le pouvoir discrétionnaire de permettre la compensation pré-post dans les cas qui s'y prêtent.

[58] Rares seront toutefois les occasions où un tribunal ne devrait pas suspendre le droit d'opérer compensation pré-post dans l'ordonnance initiale. Faut-il le rappeler, le pouvoir discrétionnaire du juge surveillant, quoique vaste, n'est pas sans limites. Il doit tendre à la réalisation des objectifs réparateurs de la LACC (*Callidus*, par. 49).

[59] En effet, la période de statu quo pourrait devenir lettre morte si l'on permettait aux créanciers d'opérer sans retenue la compensation pré-post (voir *Kitco*, par. 20 et 43). L'affaire *Tungsten*, dans laquelle le tribunal avait suspendu l'exercice de la compensation pré-post constitue un bon exemple du potentiel perturbateur de cette forme de compensation (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (« *Tungsten* (C.S.) »), par. 32, conf. par 2015 BCCA 390, 377 B.C.A.C. 6, par. 16, 20 et 25, et par 2015 BCCA 426, 378 B.C.A.C. 116, par. 29). Si le créancier pouvait, en invoquant la compensation, refuser de payer le prix pour les biens ou services fournis par la débitrice pendant la période de statu quo, la restructuration risquerait d'être torpillée. La débitrice serait incitée à ne fournir ni biens ni services à ses créanciers par

operating (see *Kitco*, at paras. 46-48). Section 32 of the *CCAA* in fact gives the debtor a right — subject to the limits and formal requirements provided for in that provision — to disclaim or resiliate any agreement to which it is a party on the day on which the restructuring proceedings commence. In addition, an interim lender would most likely refuse to continue to finance the debtor's operations during this period if the loaned funds were destined to enrich another creditor at its expense. Lastly, the rampart set up by a stay to protect against attacks from all sides by creditors would also crumble, thereby increasing the risk of the debtor's collapse and bankruptcy (see also A. R. Anderson, T. Gelbman and B. Pullen, "Recent Developments in the Law of Set-off", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 22 and 29).

[60] The inevitable interruption of the business relationship between the debtor and those who are at once creditors and customers could not come at a worse time. Without these contracts and without the payment of accounts receivable and interim financing to replenish the debtor's working capital, the resale value of its business would melt away, thus setting up roadblocks for restructuring it by way of liquidation. And such a situation could also be unfavourable to creditors that wish to effect compensation. If the debtor terminates a contract and refuses to perform it, the creditor concerned will be deprived of the benefit of the contract and will have to find a new contracting party in place of the debtor, with no guarantee that the price will remain the same.

[61] Furthermore, where pre-post compensation has been stayed, the court retains the discretion to lift the stay based on the specific facts of each case. However, it must be cautious in doing so, given the high disruptive potential of such compensation.

[62] In conclusion, we are of the view that ss. 11 and 11.02 of the *CCAA* authorize a court to stay pre-post compensation. Although we would temper the rule from *Kitco*, which involves an absolute prohibition against pre-post compensation, it is our view

crainte de ne pas être payée en retour; elle serait alors privée des fonds nécessaires pour poursuivre ses opérations (voir *Kitco*, par. 46-48). L'article 32 de la *LACC* lui donne justement le droit de résilier tout contrat auquel elle est partie à la date à laquelle les procédures de restructuration ont été intentées, sous réserve des limites et formalités qui sont prévues par cette disposition. De plus, le prêteur intérimaire refuserait fort probablement de continuer à financer les opérations de la débitrice durant cette période, si les sommes prêtées sont destinées à enrichir un autre créancier à son détriment. Enfin, le rempart érigé par la suspension contre les attaques tous azimuts des créanciers s'effriterait lui aussi, augmentant ainsi les risques de déconfiture et de faillite de la débitrice (voir aussi A. R. Anderson, T. Gelbman et B. Pullen, « Recent Developments in the Law of Set-off », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2009* (2010), 1, p. 22 et 29).

[60] L'inévitable interruption de la relation d'affaires entre la débitrice et ceux qui sont à la fois créanciers et clients ne pourrait intervenir à un pire moment. Sans ces contrats et sans un fonds de roulement regarni par le paiement des comptes à recevoir et le financement intérimaire, la valeur de revente de l'entreprise exploitée par la débitrice s'atrophierait, dressant alors des écueils à sa restructuration par voie de liquidation. Par ailleurs, une telle situation peut également être défavorable pour le créancier qui désire opérer compensation. Si la débitrice met fin au contrat et refuse de s'exécuter, le créancier concerné sera privé du bénéfice du contrat et devra trouver un nouveau cocontractant à la place de la débitrice, sans garantie que le prix restera le même.

[61] En outre, lorsque la compensation pré-post a été suspendue, le tribunal conserve le pouvoir discrétionnaire de lever la suspension selon les faits particuliers de chaque affaire. Cependant, il doit faire preuve de prudence, considérant le fort potentiel perturbateur d'une telle compensation.

[62] Pour conclure, nous sommes d'avis que les art. 11 et 11.02 de la *LACC* autorisent le tribunal à suspendre l'exercice de la compensation pré-post. Tout en tempérant la règle énoncée dans l'arrêt *Kitco*, qui interdisait de manière absolue la compensation

that in the vast majority of cases an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. Finally, where an initial order has stayed the right of creditors to pre-post compensation, the court retains the discretion to lift the stay having regard to the circumstances.

(b) *Scope of Section 21 of the CCAA*

[63] In addition, we note that s. 21 of the CCAA does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the CCAA. Although s. 21 of the CCAA indicates that there is a right to effect compensation in proceedings under that statute, we are of the opinion that it applies only to compensation between debts that arise *before an initial order is made* (in other words, "pre-pre compensation"). The modern approach to statutory interpretation dictates this conclusion (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Our interpretation of s. 21 of the CCAA is not based on an inappropriate analogy with the provisions of the BIA.

[64] Section 21 does state that it is possible to effect compensation in insolvency proceedings under the CCAA, but it does not specifically deal with pre-post compensation. It reads as follows:

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

Read in light of its context, its purpose and the scheme of the CCAA, s. 21 is, in our view, limited to authorizing pre-pre compensation for the purpose

pre-post, nous estimons que, dans la très vaste majorité des cas, l'ordonnance initiale suspendra, et devrait suspendre, le droit d'un créancier d'opposer à la débitrice une telle forme de compensation. Finalement, lorsque l'ordonnance initiale a suspendu le droit des créanciers à la compensation pré-post, le tribunal conserve le pouvoir discrétionnaire de lever la suspension en fonction des circonstances.

(b) *La portée de l'art. 21 de la LACC*

[63] Nous soulignons par ailleurs que l'art. 21 de la LACC ne confère pas aux créanciers un droit à la compensation pré-post qui serait à l'abri du pouvoir de suspension dont dispose le juge surveillant en vertu des art. 11 et 11.02 de la LACC. Bien que l'art. 21 de la LACC atteste d'un droit d'opérer compensation dans le cadre des procédures prises sous cette loi, nous sommes d'avis qu'il ne vise que la compensation entre des dettes nées *avant le prononcé de l'ordonnance initiale* (autrement dit, la « compensation pré-pré »). Cette conclusion s'impose suivant la méthode moderne d'interprétation des lois (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21, citant E. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87). Notre interprétation de l'art. 21 de la LACC ne repose pas sur une analogie inappropriée avec les dispositions de la LFI.

[64] En effet, cet article précise qu'il est possible d'opérer compensation dans le cadre de procédures en insolvabilité introduites sous le régime de la LACC, mais il ne traite pas expressément de la compensation pré-post. Cette disposition est rédigée ainsi :

Compensation

21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.

Lu à la lumière de son contexte, de son objet et de l'esprit de la LACC, nous sommes d'avis que l'art. 21 se limite à autoriser la compensation pré-pré aux fins

of quantifying creditors' claims on the date of commencement of proceedings.

[65] With regard to the context, s. 21 is in a different part of the statute than the one that provides for a court's discretion to order a stay. The power to order a stay (ss. 11 and 11.02) and most of the exceptions to it (see, e.g., ss. 11.01, 11.08 and 11.1) appear in Part II, which is entitled "Jurisdiction of Courts". Section 21, meanwhile, is in the division of Part III entitled "Claims", which also includes ss. 19 and 20. This indicates that Parliament probably did not consider s. 21 to be an exception to the stay period. If Parliament had in fact intended s. 21 to be an exception, it would have included it in Part II or expressly stated that it was an exception.

[66] What is more, when s. 21 is considered in the broader context of the "Claims" division, it becomes clear that this provision is part of a set of rules governing the claims that may be dealt with by a compromise or arrangement and the quantification of the resulting amounts.

[67] Section 19 specifies which claims may be dealt with by a compromise or arrangement (s. 19(1)) and those which will remain intact despite the creditors' agreement to a compromise or arrangement and its sanction by a court (s. 19(2)). Only claims arising before the date of commencement of bankruptcy or insolvency proceedings are "claims" that fall under s. 19 and therefore give creditors a right to vote on a compromise or arrangement. As for s. 20, it contains rules for determining the amount of claims. Once that amount has been determined, it can then be used to define the relative weight of the voting rights of each creditor with a claim.¹

¹ A plan of compromise or arrangement must be approved by a special majority representing two thirds in value of the creditors or a class of creditors (s. 6(1) of the CCAA).

de quantification des réclamations des créanciers au jour de l'ouverture.

[65] En ce qui concerne le contexte, l'art. 21 fait partie d'une section différente de celle visant le pouvoir discrétionnaire de suspension conféré au tribunal. Le pouvoir de suspension (art. 11 et 11.02) ainsi que la plupart de ses exceptions (voir, p. ex., art. 11.01, 11.08 et 11.1) figurent dans la partie II, intitulée « Juridiction des tribunaux ». Pour sa part, l'art. 21 fait plutôt partie de la section « Réclamations » de la partie III, qui comprend également les art. 19 et 20. Ceci indique que le législateur ne considérerait vraisemblablement pas l'art. 21 comme une exception à la période de suspension. Si son intention avait été plutôt d'en faire une exception, il aurait inclus l'art. 21 dans la partie II ou affirmé expressément qu'il s'agit d'une exception.

[66] Au surplus, il ressort d'un examen de l'art. 21 dans le contexte plus large de la section « Réclamations » que cette disposition fait partie d'un ensemble de règles encadrant les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement et la quantification des montants qui en découlent.

[67] L'article 19 précise quelles sont les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement (par. (1)) et celles qui demeureront intactes malgré l'acceptation par les créanciers d'une transaction ou d'un arrangement et son homologation par le tribunal (par. (2)). Seules les créances ayant pris naissance avant la date d'ouverture des procédures en faillite ou insolvabilité constituent des « réclamations » visées par l'art. 19 et donnent ainsi aux créanciers le droit de voter sur une transaction ou un arrangement. Quant à l'art. 20, il contient des règles permettant de déterminer le montant des réclamations. Une fois déterminé, ce montant permet ensuite de définir le poids relatif du droit de vote de chaque créancier détenant une réclamation¹.

¹ Le plan de transaction ou d'arrangement doit être approuvé par une majorité qualifiée des deux tiers en valeur des créanciers ou d'une catégorie de créanciers (par. 6(1) de la LACC).

[68] Section 21 complements ss. 19 and 20; the compensation authorized by s. 21 is intended, among other things, to determine the value of the claim that a creditor may have against the debtor on the *date of commencement of proceedings*. In other words, the purpose of s. 21 is to provide an accurate picture of the pecuniary interest each creditor has in the restructuring on the date of commencement of proceedings, and of the number of votes each creditor should have (see *Kitco*, at para. 83). This provision is not concerned with what might happen to the debtor's business after that date, because the date of commencement of proceedings is when [TRANSLATION] “the claims must be established” and therefore when the mutuality of debts must be assessed (B. Boucher, “Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*”, in *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (loose-leaf), by S. Rousseau, ed., fasc. 14, at No. 70; see also *Kitco*, at para. 34).

[69] With all due respect for our colleague, in light of the context of s. 21, it is evident that this provision is not meant to legitimize pre-post compensation.

[70] This contextual interpretation of s. 21, which limits its scope to pre-pre compensation, is also confirmed by the section's purpose. It was added to the CCAA to prevent the unfair situation that would result from a creditor being required to pay its debt to the debtor company in full but receiving almost nothing from the debtor in payment of its claim under an arrangement or compromise. The effect of s. 21 is that the creditor receives payment of its claim up to the value of the debt it owes to the debtor (Anderson, Gelbman and Pullen, at p. 27; Boucher, at No. 70; McElcheran, at p. 116).

[71] It is true that compensation “creat[es] a type of security interest in the [insolvent company's] estate” because it “[authorizes] the party claiming set-off [to] ‘reorde[r]’ . . . his priority” by reducing the value of that party's claim (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at paras. 59-60; see *Kitco*, at paras. 63-68). The

[68] L'article 21 complète les art. 19 et 20; la compensation autorisée par l'art. 21 vise, entre autres, à déterminer la valeur de la réclamation qu'un créancier peut avoir contre la débitrice au *jour de l'ouverture*. Autrement dit, l'art. 21 vise à donner l'heure juste sur l'intérêt pécuniaire que détient chaque créancier dans la restructuration au jour de l'ouverture et le nombre de votes dont il devrait disposer (voir *Kitco*, par. 83). Cette disposition s'intéresse peu à ce qui pourrait se passer postérieurement à cette date dans les affaires de la débitrice; en effet, c'est au jour de l'ouverture que « doivent être établies les réclamations » et donc que la réciprocité des dettes doit s'apprécier (B. Boucher, « Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, n° 70; voir aussi *Kitco*, par. 34).

[69] Avec égards pour l'opinion de notre collègue, à la lumière du contexte de l'art. 21, il est apparent que cette disposition n'a pas pour vocation de légitimer la compensation pré-post.

[70] Cette interprétation contextuelle de l'art. 21, qui limite son champ d'application à la compensation pré-pré, est également confirmée par son objet. Cette disposition a été ajoutée à la LACC afin de prévenir l'injustice qui résulterait du fait qu'un créancier serait tenu de payer intégralement sa dette à la compagnie débitrice, mais ne recevrait presque rien de la débitrice en paiement de sa créance aux termes d'un arrangement ou d'une transaction. En raison de l'art. 21, le créancier reçoit paiement de sa créance jusqu'à concurrence de la valeur de la dette qu'il devait à la débitrice (Anderson, Gelbman et Pullen, p. 27; Boucher, n° 70; McElcheran, p. 116).

[71] Il est vrai que la compensation « crée une sorte de garantie sur l'actif de la [compagnie insolvable] », parce qu'elle « autorise la partie qui invoque la compensation à “modifier” l'ordre de priorité » en réduisant la valeur de sa créance (*Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 59-60; voir *Kitco*, par. 63-68). Le créancier

creditor uses its indebtedness to the debtor as a form of security for its claim, security that is equal in value to its debt to the insolvent company (*Stein v. Blake*, [1996] 1 A.C. 243 (H.L.), at p. 251). This portion of its claim is therefore sure to be paid in full (*Husky Oil*, at para. 58). The effect of compensation is thus to deviate from the principle of equality among ordinary creditors, a fundamental principle of insolvency law that applies with equal force in proceedings under the CCAA, one of the remedial objectives of which is to ensure the fair and equitable treatment of the claims made against a debtor (*Callidus*, at para. 40). The exception created by compensation must therefore be interpreted narrowly. As a general rule, “[o]nce a formal insolvency process commences, all unsecured creditor remedies are stayed and the creditor must stand in line behind secured and preferred creditors and share any remaining recoveries in the estate *pro rata* with all other unsecured creditors” (McElcheran, at p. 78).

[72] The prejudice suffered by a creditor wishing to effect pre-post compensation does not justify expanding the scope of s. 21. When the debt owed by the creditor arises after a stay order has been made, prejudice is merely illusory. The fact that the creditor contracted obligations toward the debtor company during the stay period does not place it in a worse situation than it would have been in had it contracted with a third party instead. If it had contracted with a third party, it would likewise have had to pay the full price of the goods or services it obtained (*Tungsten* (S.C.), at para. 27). A creditor that contracts with the debtor company during the status quo period knows or ought to know that it will probably receive only pennies on the dollar in payment of its pre-order claim and that payment of its post-order debt will benefit it and the other creditors.

[73] Because there is really prejudice only in the case of pre-pre compensation, this exception to the

se sert de sa dette envers la débitrice comme d’une forme de garantie à l’égard de sa créance, une garantie d’une valeur égale à sa dette envers la compagnie insolvable (*Stein c. Blake*, [1996] 1 A.C. 243 (H.L.), p. 251). Cette portion de sa créance est donc assurée d’être payée en totalité (*Husky Oil*, par. 58). Par ses effets, la compensation déroge ainsi au principe de l’égalité entre les créanciers ordinaires, un principe fondamental du droit de l’insolvabilité qui s’applique avec autant de force dans le cadre de procédures intentées sous le régime de la LACC, dont l’un des objectifs réparateurs vise à assurer un traitement juste et équitable des réclamations déposées contre un débiteur (*Callidus*, par. 40). L’exception créée par la compensation doit donc être interprétée de manière restrictive. En règle générale, [TRADUCTION] « [u]ne fois que s’amorce formellement une procédure en matière d’insolvabilité, tous les recours des créanciers non garantis sont suspendus et chaque créancier doit faire la queue derrière les créanciers garantis et les créanciers privilégiés, et partager avec tous les autres créanciers non garantis, au prorata, toute somme qui reste dans le patrimoine » (McElcheran, p. 78).

[72] Le préjudice subi par un créancier désirant opérer compensation pré-post ne justifie pas d’élargir la portée de l’art. 21. Lorsque la dette due par le créancier prend naissance après le prononcé de l’ordonnance de suspension, le préjudice n’est qu’illusoire. Le fait que le créancier ait contracté des obligations envers la compagnie débitrice durant la période de suspension ne le place pas dans une pire situation que celle dans laquelle il aurait été s’il avait plutôt contracté avec un tiers. S’il avait contracté avec un tiers, il aurait de la même façon été contraint de payer intégralement le prix des produits ou services qu’il a obtenus (*Tungsten* (C.S.), par. 27). Le créancier qui contracte avec la compagnie débitrice durant la période de statu quo sait ou devrait savoir qu’il ne recevra probablement que des sous pour chaque dollar de sa créance pré-ordonnance et que le paiement de sa dette post-ordonnance lui bénéficiera, ainsi qu’aux autres créanciers.

[73] Puisque le préjudice ne se manifeste réellement qu’en ce qui concerne la compensation pré-pré,

principle of equality should apply to only one of the debtor's assets on the date of commencement of insolvency proceedings, that is, the debt owed to it by the creditor (*Kitco*, at para. 68; *Husky Oil*, at para. 59). Otherwise, giving the green light to pre-post compensation would amount to granting certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings (for example, amounts received as interim financing). Professor Wood aptly describes the injustice that would thus befall the other ordinary creditors whose rights and remedies have been stayed:

The ability to exercise a right of set-off in restructuring proceedings can operate to improve greatly the position of one creditor at the expense of the other creditors. This is illustrated in the following example. Suppose that the debtor company owes \$1,000 to a creditor. The debtor company then initiates restructuring proceedings. While the proceedings are under way, the debtor company sells and delivers goods to the creditor for \$1,000. By exercising its right of set-off, the creditor obtains full recovery of its claim at the expense of the other unsecured creditors whose claims will be compromised or otherwise affected by the plan. [p. 400]

[74] Yet the very purpose of the stay period is to ensure that no creditor gains an advantage over the others while the restructuring of the debtor company is under way (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (S.C.), at para. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at para. 6); *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, at para. 17). Pre-post compensation should not allow a creditor to do indirectly what it cannot do directly. Parliament could not have intended to create such an additional security interest that can be realized during the stay period simply because the creditor and the debtor company have a continuing business relationship.

[75] To repeat, viewing s. 21 as allowing pre-post compensation would undermine the effectiveness of the status quo period, would jeopardize the survival

cette exception au principe de l'égalité ne devrait donc porter que sur un seul des éléments d'actifs de la débitrice au jour de l'ouverture des procédures en insolvabilité, c'est-à-dire la dette du créancier à son endroit (*Kitco*, par. 68; *Husky Oil*, par. 59). Autrement, donner le feu vert à la compensation pré-post équivaldrait à attribuer à certains créanciers une « sorte de garantie » additionnelle sur de nouveaux éléments d'actif acquis par la débitrice après l'ouverture des procédures (par exemple, les sommes reçues à titre de financement intérimaire). Le professeur Wood décrit bien l'injustice qui serait ainsi causée aux autres créanciers ordinaires dont les droits et recours sont suspendus :

[TRANSLATION] La capacité d'exercer un droit d'opérer compensation lors de procédures de restructuration peut avoir pour effet d'améliorer grandement la position d'un créancier au détriment des autres. Voici un exemple qui illustre cette affirmation. Supposons qu'une compagnie débitrice doit 1 000 \$ à un créancier. Cette compagnie entame des procédures de restructuration. Alors que les procédures sont en cours, la compagnie débitrice vend et livre au créancier des biens d'une valeur de 1 000 \$. Exerçant son droit d'opérer compensation, ce dernier recouvre entièrement le montant de sa réclamation, au détriment des autres créanciers non garantis, dont les réclamations seront compromises ou autrement affectées par le plan. [p. 400]

[74] Or, l'objectif de la période de suspension est justement d'empêcher un créancier d'être avantagé par rapport aux autres pendant la restructuration de la compagnie débitrice (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (C.S.), par. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), par. 6; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, par. 17). La compensation pré-post ne devrait pas permettre à un créancier de faire indirectement ce qu'il ne peut faire directement. Le législateur ne peut avoir souhaité créer une telle garantie additionnelle pouvant être réalisée pendant la période de suspension du seul fait que le créancier et la compagnie débitrice ont une relation d'affaires qui se poursuit.

[75] Faut-il le rappeler, considérer que l'art. 21 autorise la compensation pré-post minerait l'efficacité de la période de statu quo, mettrait en péril la survie

of the debtor company or the business it operates and could derail the restructuring process. It is clear that Parliament could not have intended that a struggling company, deprived of its only lifeline, be condemned to drown in its debts solely because a single creditor wanted to gain an advantage over the others. Such an outcome is contrary to the fundamental objectives of the CCAA.

[76] Before concluding, we will pause to briefly discuss *Kitco*. In that case, the Court of Appeal rejected a literal interpretation of s. 21 as allowing all forms of compensation, including pre-post compensation, without any restrictions. Our colleague is of the view that *Kitco*, which was applied by the majority of the Court of Appeal and by the supervising judge in the instant case, has created an asymmetry between the interpretation given to s. 21 of the CCAA by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. He cites *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (Ont. S.C.J.), and *Tungsten* in this regard.

[77] In our view, *Kitco* is not at odds with the jurisprudence of the rest of the country on the interpretation of s. 21. *Air Canada* and *Tungsten* did not determine whether pre-post compensation is consistent with the interpretation and objectives of the CCAA, let alone establish a framework for the exercise of this right by creditors.

[78] First of all, in *Air Canada*, the issues did not relate to the impact of pre-post compensation on the achievement of the CCAA's objectives. Rather, the case concerned the requirements for legal set-off at common law and the interpretation of a provision of the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, that was worded differently from s. 18.1 (now s. 21) of the CCAA. On the subject of legal set-off, *Air Canada* argued that the making of an initial order under the CCAA results in a loss of mutuality between debts, by analogy with the vesting of a bankrupt's property in a trustee under the *BIA*. This was the context in which the court found that an

de la compagnie débitrice ou de l'entreprise qu'elle exploite et pourrait faire dérailler la restructuration. Il ne fait aucun doute que le législateur ne peut avoir souhaité qu'une compagnie en difficulté, privée de sa seule bouée de sauvetage, soit condamnée à crouler sous le poids de ses dettes, uniquement parce qu'un seul créancier a souhaité s'avantager au détriment des autres. Un tel résultat va à l'encontre des objectifs fondamentaux de la LACC.

[76] Avant de conclure, nous ouvrons une parenthèse au sujet de l'arrêt *Kitco*. Dans cette affaire, la Cour d'appel a rejeté l'interprétation littérale de l'art. 21 selon laquelle cette disposition autoriserait sans réserve toute forme de compensation, y compris la compensation pré-post. Notre collègue est d'avis que cet arrêt, appliqué par la majorité de la Cour d'appel et la juge surveillante dans la présente affaire, crée une asymétrie entre l'interprétation par les tribunaux québécois de l'art. 21 de la LACC et celle des tribunaux des autres provinces canadiennes. Notre collègue cite à cet égard les affaires *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (C.S.J. Ont.), et *Tungsten*.

[77] À notre avis, l'arrêt *Kitco* ne s'inscrit pas en faux contre la jurisprudence du reste du pays en ce qui concerne l'interprétation de l'art. 21. En effet, les affaires *Air Canada* et *Tungsten* n'ont pas tranché la question de savoir si la compensation pré-post est conforme à l'interprétation et aux objectifs de la LACC, et encore moins établi les balises entourant l'exercice de ce droit par des créanciers.

[78] D'abord, dans l'affaire *Air Canada*, les questions en litige ne portaient pas sur les répercussions de la compensation pré-post sur la réalisation des objectifs de la LACC. Cette affaire portait plutôt sur les critères de la compensation légale en common law, ainsi que sur l'interprétation d'une disposition de la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11, dont le texte différerait de celui de l'art. 18.1 de la LACC (maintenant l'art. 21 de la LACC). Au chapitre de la compensation légale, *Air Canada* prétendait que le prononcé d'une ordonnance initiale en vertu de la LACC entraînait une perte de réciprocité entre

initial order under the CCAA does not alter the status of creditor and debtor of the insolvent company, unlike what happens in a bankruptcy proceeding.

[79] Moreover, in *Tungsten*, the dispute related primarily to the possibility of staying the right to pre-post set-off. The judge who ruled on the applications did not analyze the arguments concerning the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, finding that it was not necessary to do so in the circumstances. Our colleague maintains that the question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted by s. 21 of the CCAA. In our view, the fact that the possibility of effecting pre-post set-off was not argued tends more to weaken the authority of that decision than to strengthen it.

[80] Therefore, and with due respect for the contrary view, the state of the law on the interpretation of s. 21 had not been settled elsewhere in Canada. When ruling in *Kitco*, the Court of Appeal was not bound by *Air Canada* and *Tungsten*.

[81] In summary, we conclude, as the Court of Appeal did in *Kitco*, that s. 21 of the CCAA allows pre-pre compensation for the purpose of quantifying creditors' claims on the date of commencement of proceedings (*Kitco*, at para. 82). This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the CCAA does not prohibit this form of compensation either. A supervising judge therefore retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

[82] We turn now to the situation in this case.

les dettes, par analogie avec la saisine des biens du failli par un syndic sous le régime de la *LFI*. C'est dans ce contexte que le tribunal a conclu que l'ordonnance initiale rendue en application de la *LACC* ne modifie pas les qualités de créancière et de débitrice de la société insolvable, contrairement à une procédure de faillite.

[79] De plus, dans l'affaire *Tungsten*, le litige portait principalement sur la possibilité de suspendre le droit à la compensation pré-post. En première instance, le juge n'a procédé à aucune analyse des arguments relatifs aux impacts de la compensation pré-post sur la période de statu quo et sur les objectifs sous-jacents de cette dernière, estimant qu'il n'était pas nécessaire de le faire dans les circonstances. Notre collègue soutient que la question de savoir si la compensation pré-post pouvait s'opérer n'a jamais été soulevée par les parties, ce qui démontrait implicitement que cette compensation était permise par l'art. 21 de la *LACC*. Selon nous, l'absence de débat sur la possibilité d'opérer compensation pré-post a davantage pour effet d'affaiblir l'autorité de cette décision que de la renforcer.

[80] En conséquence, et avec égards pour l'opinion contraire, l'état du droit n'était pas définitif ailleurs au Canada sur l'interprétation de l'art. 21. Lorsqu'elle s'est prononcée dans l'arrêt *Kitco*, la Cour d'appel n'était pas liée par les affaires *Air Canada* et *Tungsten*.

[81] En somme, à l'instar de la Cour d'appel dans l'arrêt *Kitco*, nous concluons que l'art. 21 de la *LACC* permet la compensation pré-pré aux fins de quantification des réclamations des créanciers au jour de l'ouverture (*Kitco*, par. 82). Cette disposition n'a pas pour effet d'autoriser la compensation pré-post. Cela dit, l'art. 21 de la *LACC* n'a pas non plus pour effet d'interdire cette forme de compensation. Ainsi, le juge surveillant conserve le pouvoir discrétionnaire de suspendre ou d'autoriser l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law.

[82] Voyons ce qu'il en est en l'espèce.

(c) *Application*

[83] In the case at bar, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation:

No Exercise of Rights or Remedies

ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Debtors is a party as a result of the insolvency of the foreign Debtors and/or these CCAA proceedings, any events of default or non-performance by the Debtors or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Debtors, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court.

...

No Interference with Rights

ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, except with the written consent of the Debtors, as applicable, and the Monitor, or with leave of this Court. [Emphasis added.]

(A.R., vol. I, at p. 75)

[84] Given that the order stayed compensation in respect of pre-post claims, what remains to be determined is whether the Superior Court should have

c) *Application*

[83] Dans la présente affaire, les termes de l’ordonnance de suspension rendue par le Tribunal sont suffisamment larges pour interdire la compensation pré-post :

[TRADUCTION]

Suspension des droits et recours

ORDONNE CE QUI SUIIT : Durant la Période de suspension, et sous réserve, entre autres, de l’article 11.1 de la LACC, tous les droits et recours, notamment les modifications aux droits existants et les événements réputés survenir suivant toute entente à laquelle l’un des Débiteurs est partie en raison de l’insolvabilité des Débiteurs étrangers et/ou des présentes procédures fondées sur la LACC, de quelque manquement ou inexécution par les Débiteurs ou de quelque admission ou témoignage dans le cadre de ces procédures fondées sur la LACC, de quelque personne physique, firme, personne morale, société de personnes, société à responsabilité limitée, fiducie, coentreprise, association, organisation, organisme ou agence du gouvernement, ou de toute autre entité (toutes les entités énumérées précédemment étant appelées collectivement « Personnes » et individuellement « Personne ») visant les Débiteurs ou s’y rapportant, ou touchant l’Entreprise, les Biens ou toute partie de ceux-ci, sont suspendus par les présentes, sauf sur autorisation de la Cour.

...

Interdiction de porter atteinte aux droits

ORDONNE CE QUI SUIIT : Durant la Période de suspension, il est interdit à toute Personne de supprimer, de refuser d’honorer, de modifier, de violer, de répudier, de résilier ou de cesser d’exécuter, selon le cas, quelque droit, droit de renouvellement, contrat, entente, licence ou permis en faveur des Débiteurs ou détenu par ceux-ci, sauf avec le consentement écrit des Débiteurs, le cas échéant, et du Contrôleur, ou sur autorisation de la Cour. [Nous soulignons.]

(d.a., vol. I, p. 75)

[84] L’ordonnance ayant suspendu la compensation à l’égard des créances pré-post, il reste à déterminer si le Tribunal aurait dû exercer son

exercised its discretion under s. 11 of the CCAA and allowed such compensation in respect of the VRP claim. Although we are of the view that the supervising judge erred in finding, in reliance on *Kitco*, that she had no discretion to authorize pre-post compensation, we feel that remanding the case to the court of original jurisdiction would be unhelpful and would not be in the interests of justice. What is more, the delays resulting from this case have prejudiced the rights of third persons in good faith involved in the restructuring of SM Group. In this regard, Thornhill was unable to reimburse, as stipulated, the transition financing granted by the interveners Alaris Royalty Corp. and Integrated Private Debt Fund V LP, which are also creditors of SM Group, largely because of the City's refusal to pay the cost of the work done by SM Group.

[85] In exercising its discretion under the CCAA, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part (*Callidus*, at para. 49; *Century Services*, at para. 70).

[86] The first consideration, the appropriateness of the order being sought, relates both to the order itself and to the means that are employed (*Century Services*, at para. 70). It is assessed in light of the remedial objectives of the CCAA (*Callidus*, at para. 49; *Century Services*, at para. 70). These remedial objectives include the following: avoiding the social and economic losses resulting from the liquidation of an insolvent company; maximizing creditor recovery; ensuring fair and equitable treatment of the claims against the debtor company; preserving going-concern value where possible; protecting jobs and communities affected by the company's financial distress; and enhancing the credit system generally (*Callidus*, at paras. 40-42). In this regard, the context of restructuring by way of liquidation, and the impact of pre-post compensation on its progress, can be weighed by a court in exercising its discretion. In addition, protecting the public interest, although it overlaps a number of the remedial objectives to be considered by the courts, must also be included

pouvoir discrétionnaire en vertu de l'art. 11 de la LACC et permettre l'application de cette compensation à l'égard de la créance PRV. Bien que nous soyons d'avis que la juge surveillante a fait erreur en concluant qu'elle ne possédait aucun pouvoir discrétionnaire l'habilitant à autoriser la compensation pré-post en se basant sur l'arrêt *Kitco*, il nous apparaît que le renvoi du dossier en première instance serait inutile et contraire aux intérêts de la justice. Au surplus, les délais occasionnés par le présent dossier causent préjudice aux droits des tiers de bonne foi ayant participé à la restructuration de Groupe SM. À cet égard, Thornhill n'a pas été en mesure de rembourser, selon les termes stipulés, le financement de transition consenti par les intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP, également créancières de Groupe SM, notamment en raison du refus de la Ville d'acquitter le coût des travaux effectués par Groupe SM.

[85] Dans l'exercice du pouvoir discrétionnaire que lui confère la LACC, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur (*Callidus*, par. 49; *Century Services*, par. 70).

[86] La première considération, soit le caractère opportun de l'ordonnance sollicitée, vise tout autant l'ordonnance elle-même que les moyens utilisés (*Century Services*, par. 70). Elle s'évalue au regard des objectifs réparateurs de la LACC (*Callidus*, par. 49; *Century Services*, par. 70). Parmi ces objectifs réparateurs, mentionnons les suivants : éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable; maximiser le recouvrement au profit des créanciers; assurer un traitement juste et équitable des réclamations déposées contre la compagnie débitrice; préserver la valeur d'exploitation dans la mesure du possible; protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise; améliorer le système de crédit de manière générale (*Callidus*, par. 40-42). À ce chapitre, le contexte d'une restructuration par voie de liquidation, ainsi que les répercussions de la compensation pré-post sur son bon déroulement, peuvent être soupesés par le tribunal dans l'exercice de son pouvoir discrétionnaire. De

in this list (*Callidus*, at para. 40; *Century Services*, at para. 60).

[87] Here, the City argues that protecting the public interest is a consideration that favours pre-post compensation. It submits that the majority of the Court of Appeal erred in not considering [TRANSLATION] “the public interest in ensuring the recovery of fraudulently misappropriated public funds” (A.F., at para. 2; see also para. 80). We cannot accept this argument, for the following reasons.

[88] In our view, the City is wrongly conflating the public interest with its own interest as a public body with a claim. The objective of protecting the public interest does not mean that public bodies should be placed in a better position than other creditors because their claims relate to public funds. That would be contrary to the principle of equality among creditors. In the context of the CCAA, protecting the public interest therefore cannot be reduced to protecting the interests of a particular creditor. It involves taking account of interests beyond those of the debtor company and its creditors, such as the interests of employees whose jobs are threatened or of the community in which the debtor company operates (*Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 102; *Metcalfe*, at paras. 50-52; Sarra, at pp. 162 and 501; Wood, at p. 341; see also, for a clear illustration, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), at para. 50).

[89] Protecting the public interest can also encompass considerations of commercial morality that reflect societal norms, such as considerations related to the fact that no one should profit from fraudulent activities in which they have taken part (A. Keay, “Insolvency Law: A Matter of Public Interest?” (2000), 51 *N. Ir. Legal Q.* 509, at pp. 513 and 525). In very specific circumstances, a court could therefore conclude that protection of the public interest and the CCAA’s other remedial objectives justify authorizing

surcroît, bien qu’elle recoupe un certain nombre des objectifs réparateurs dont les tribunaux doivent tenir compte, la protection de l’intérêt public doit elle aussi figurer sur cette liste (*Callidus*, par. 40; *Century Services*, par. 60).

[87] En l’espèce, la Ville prétend que la protection de l’intérêt public milite en faveur de la compensation pré-post. Elle estime que les juges majoritaires de la Cour d’appel ont commis une erreur en ne considérant pas « l’intérêt public de voir à la récupération des deniers publics détournés frauduleusement » (m.a., par. 2; voir aussi par. 80). Nous ne pouvons retenir cette prétention. Voici pourquoi.

[88] Selon nous, la Ville amalgame à tort l’intérêt public avec son propre intérêt en tant qu’organisme public titulaire d’une créance. L’objectif de protection de l’intérêt public ne signifie pas que les entités publiques devraient être placées dans une position plus avantageuse que les autres créanciers parce que leurs créances concernent des deniers publics. Cela contredit le principe de l’égalité entre les créanciers. Dans le contexte de la LACC, la protection de l’intérêt public ne saurait donc être réduite à la protection de l’intérêt d’un créancier en particulier. Elle suppose la prise en compte d’intérêts qui dépassent ceux de la compagnie débitrice et de ses créanciers, comme celui des employés dont les emplois sont menacés ou celui de la communauté dans laquelle évolue la compagnie débitrice (*Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, par. 102; *Metcalfe*, par. 50-52; Sarra, p. 162 et 501; Wood, p. 341; voir aussi, pour une illustration éloquent, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (C.J. Ont. (Div. gén.)), par. 50).

[89] La protection de l’intérêt public peut aussi s’étendre à des considérations de moralité commerciale qui reflètent les normes sociales, comme des considérations liées au fait que nul ne devrait bénéficier d’activités frauduleuses auxquelles il a pris part (A. Keay, « Insolvency Law : A Matter of Public Interest? » (2000), 51 *N. Ir. Legal Q.* 509, p. 513 et 525). Dans des circonstances bien particulières, le tribunal pourrait donc conclure que la protection de l’intérêt public, de même que les

pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the CCAA, which explains the relevance of determining whether the VRP claim is a claim resulting from fraud in this case. But while such a conclusion is possible in law, it should not be drawn automatically. In every case, a court should exercise its discretion as indicated in *Callidus* and *Century Services*, and if it so happens that predominant weight must be given to the objective of protecting the public interest, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors.

[90] In the instant case, the City's VRP claim is an ordinary claim because, as we have indicated, the City has not proved the alleged fraud and such proof cannot be inferred solely from the fact that its claim is related to an agreement entered into under the VRP. Its argument that the objective of protecting the public interest favours pre-post compensation must therefore be rejected. The City has not relied on any of the CCAA's other remedial objectives in support of its position. It follows that it has not discharged its burden of proving that the order being sought is appropriate. Moreover, the work performed for the City by SM Group was in the public interest, as it involved continuing to carry out major projects, such as the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

[91] The second consideration, due diligence, clearly weighs against pre-post compensation by the City. Under the CCAA, this consideration is important because it "discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage" (*Callidus*, at para. 51). The procedure set out in the CCAA involves negotiations as well as compromises between the debtor and stakeholders and is overseen by a court and a monitor; it follows that all those who participate must be on an equal footing and must have a clear understanding of their respective obligations and rights (para. 51). This

autres objectifs réparateurs de la LACC, justifient d'autoriser la compensation pré-post en faveur d'un créancier qui a démontré avoir été victime de fraude au sens de l'al. 19(2)d) de la LACC, d'où la pertinence de déterminer si la créance PRV est une réclamation qui découle de fraude dans le cas qui nous occupe. Mais si une telle conclusion est possible en droit, elle ne devrait pas relever de l'automatisme. Dans chaque cas, le tribunal doit exercer son pouvoir discrétionnaire de la façon indiquée dans les arrêts *Callidus* et *Century Services*, et si d'aventure il est appelé à accorder un poids prépondérant à l'objectif de protection de l'intérêt public, il doit se garder de réduire l'intérêt public à l'intérêt d'un créancier ou d'un groupe de créanciers en particulier.

[90] En l'espèce, la créance PRV de la Ville est une créance ordinaire, puisque, comme nous l'avons indiqué, la Ville n'a pas apporté la preuve de la fraude alléguée et cette preuve ne saurait s'inférer du seul fait que sa créance se rattache à une entente conclue en vertu du PRV. En conséquence, sa prétention selon laquelle l'objectif de protection de l'intérêt public milite en faveur de la compensation pré-post doit être rejetée. La Ville n'a pas invoqué d'autre objectif réparateur de la LACC au soutien de sa position. Il s'ensuit qu'elle ne s'est pas déchargée du fardeau qui lui incombait d'établir le caractère indiqué de l'ordonnance sollicitée. De plus, les travaux effectués par Groupe SM pour la Ville étaient dans l'intérêt public, puisqu'ils consistaient à poursuivre la réalisation de chantiers majeurs, tels que la construction du pont Samuel-De Champlain et la réfection de l'échangeur Turcot.

[91] La deuxième considération, soit celle de la diligence, milite clairement à l'encontre de l'exercice de la compensation pré-post par la Ville. Sous le régime de la LACC, cette considération est importante étant donné qu'elle « décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'utilisent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage » (*Callidus*, par. 51). La procédure prévue par la LACC implique des négociations ainsi que des transactions entre le débiteur et les intéressés et elle est supervisée par le tribunal et le contrôleur; il s'ensuit que tous les acteurs qui y participent doivent

Court accordingly reached the following conclusion in *Callidus*:

A party's failure to participate in CCAA proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the CCAA regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently). [para. 51]

[92] In this case, it is clear that the City did not act in accordance with the standard of diligence expected in CCAA proceedings. On this point, Deloitte submits that the City should have given notice of its intention to effect compensation in the days after the initial order was made on August 24, 2018. The record does not show that the City learned of the initial order on August 24, 2018, but, as indicated in an email to counsel for Deloitte, the City was aware of the existence of that order by at least September 10, 2018. Whatever the case may be, we are of the view that a diligent creditor, after learning of the debtor's insolvency when it is subject to proceedings under the CCAA, cannot wait 47 to 58 days to notify the debtor of its intention to effect compensation.

[93] The City justifies the lateness of its application by stating that it was waiting for one of the payments on the VRP claim, which was due on October 31, 2018, before taking any action. Yet the VRP agreement indicates that the payment in question was actually due on October 1, 2018. Furthermore, the City knew or ought to have known that the term had already expired several weeks earlier, as SM Group's insolvency had resulted in the loss of the benefit of the term of the VRP claim.

se trouver sur un pied d'égalité et avoir une compréhension sans équivoque de leurs obligations et droits respectifs (par. 51). En conséquence, dans l'arrêt *Callidus*, notre Cour a conclu :

La partie qui, dans le cadre d'une procédure fondée sur la LACC, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie). [par. 51]

[92] Dans la présente affaire, il appert clairement que la Ville ne s'est pas comportée conformément à la norme de diligence attendue dans le cadre d'une procédure fondée sur la LACC. À ce propos, Deloitte soutient que la Ville aurait dû signifier son intention d'opérer compensation dans les jours qui ont suivi le prononcé de l'ordonnance initiale, le 24 août 2018. Le dossier ne révèle pas que la Ville a pris connaissance de l'ordonnance initiale dès le 24 août 2018, mais, tel qu'indiqué dans un courriel adressé au procureur de Deloitte, elle connaissait l'existence de cette ordonnance depuis le 10 septembre 2018 au moins. Quoi qu'il en soit, nous sommes d'avis qu'un créancier diligent, une fois qu'il a pris connaissance de l'insolvabilité du débiteur alors qu'il est l'objet d'une procédure intentée en vertu de la LACC, ne peut attendre de 47 à 58 jours pour lui signifier son intention d'opérer compensation.

[93] La Ville justifie la tardiveté de sa demande en affirmant qu'elle attendait un des paiements de la créance PRV dû le 31 octobre 2018, avant de prendre quelque action que ce soit. Or, l'entente PRV indique plutôt que ce paiement était dû le 1^{er} octobre 2018. De plus, la Ville savait ou aurait dû savoir que le terme était échu depuis plusieurs semaines déjà, puisque l'insolvabilité de Groupe SM a entraîné la perte du bénéfice du terme de la créance PRV.

[94] Whether intentional or not, this inaction on the City's part tended to place it in a better position than other ordinary creditors at what, we should point out, was a critical time in the restructuring process. By invoking compensation, the City could obtain services without paying for them. The City had to suspect that if it had indicated its intention to proceed in this manner right from the start, as due diligence requires, SM Group would likely have refused to undertake the work provided for in the contract, knowing that it would not be paid and that this would be a major stumbling block in the interim financing process. What is more, under s. 32 of the CCAA, SM Group could even have asked that the contract be resiliated.

[95] In summary, the considerations that guide the exercise of a court's discretion do not justify lifting the stay of the City's right to pre-post compensation. Given our conclusions on the first two considerations, it is not necessary for us to discuss the City's good faith. In our view, remanding the case to the court of original jurisdiction would lead inevitably to the same outcome.

B. *Water Meter Contract Claim*

[96] Here again, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation. However, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in the case relating to the water meter contract. The relevant excerpts from its judgment are as follows:

[TRANSLATION]

THE COURT, seized of the Application of Ville de Montréal dated September 27, 2018 for authorization to lift the stay of proceedings in order to deal with and liquidate a claim in the Civil Division ("**Application**");

...

LIFTS, in favour of the Applicant, Ville de Montréal, the stay of proceedings ordered in this case with regard to S.M.

[94] Intentionnelle ou non, cette inaction de la Ville était de nature à la placer dans une position plus avantageuse que celle des autres créanciers ordinaires, et ce, faut-il le souligner, à un moment crucial des procédures de restructuration. En effet, en invoquant compensation, elle pouvait, ce faisant, obtenir des services sans les payer. La Ville devait se douter que si elle avait manifesté son intention de procéder ainsi dès le départ, en toute diligence, Groupe SM aurait vraisemblablement refusé d'entreprendre les travaux prévus au contrat, sachant qu'il ne serait pas payé et qu'il s'agirait là d'un obstacle majeur au processus de financement intérimaire. Qui plus est, suivant l'art. 32 de la LACC, Groupe SM aurait même pu demander la résiliation de ce contrat.

[95] En somme, les considérations guidant l'exercice du pouvoir discrétionnaire du tribunal ne justifient pas de lever la suspension du droit à la compensation pré-post de la Ville. Considérant nos conclusions relatives aux deux premières considérations, il n'est pas nécessaire de nous pencher sur la bonne foi de la Ville. Nous sommes d'avis que le renvoi du dossier en première instance mènerait inéluctablement au même résultat.

B. *Créance relative au contrat des compteurs d'eau*

[96] Ici encore, les termes de l'ordonnance de suspension prononcée par le Tribunal sont suffisamment larges pour interdire la compensation pré-post. Le Tribunal a cependant accepté de lever la suspension des procédures pour permettre à la Ville d'établir l'existence et le montant de sa créance dans le dossier relatif au contrat des compteurs d'eau. Voici les extraits pertinents de son jugement :

...

LE TRIBUNAL, saisi de la Demande de la Ville de Montréal datée du 27 septembre 2018 pour être autorisée à lever la suspension des procédures afin de traiter et liquider une réclamation en Chambre civile (la « **Demande** »);

LÈVE, en faveur de la Requérante Ville de Montréal, la suspension des procédures ordonnée dans ce dossier

Consultants Inc., The S.M. Group Inc., The SMI Group Inc. and The S.M. Group International L.P. (“**Debtors Concerned**”) . . . for the sole purpose of allowing the Applicant, Ville de Montréal, to establish its claim against the Debtors Concerned . . . in the proceedings instituted in the Superior Court of Quebec bearing number 500-17-104932-184; [Emphasis added.]

(A.R., vol. IV, at p. 129)

[97] This order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. The City submits that it is entitled to withhold the payments owed to SM Group until judgment is rendered in that case.

[98] In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of the case relating to the water meter contract would not be appropriate. Remanding the case to the court of original jurisdiction for a decision on this question would, once again, be unhelpful and contrary to the interests of justice.

[99] Not only would the order being sought by the City place Thornhill at the mercy of the outcome of lengthy and complex judicial proceedings — which, it must not be forgotten, concern a claim for several million dollars — but it would not be appropriate for the same reasons as those relating to the VRP claim. The City is conflating the public interest with its own interest as a public body with a claim that was never established. In addition, the City did not act diligently. Although its originating application in the case relating to the water meter contract was filed on September 26, 2018, it breached its obligation of diligence by waiting until November 7, 2018 before indicating its intention to effect compensation, even though it had been aware of the initial order since at least September 10, 2018.

à l’égard de Les Consultants S.M. inc., Le Groupe S.M. inc., le Groupe SMI inc. et Le Groupe S.M. International S.E.C. (les « **Débitrices visées** ») [. . .] afin uniquement de permettre à la Requérante, Ville de Montréal, d’établir sa réclamation contre les Débitrices visées [. . .] dans le cadre des procédures initiées devant la Cour supérieure du Québec portant le numéro 500-17-104932-184; [Nous soulignons.]

(d.a., vol. IV, p. 129)

[97] Cette ordonnance n’a pas autorisé la Ville à retenir les sommes dues à Groupe SM pour les travaux postérieurs à l’ordonnance initiale en vue d’opérer compensation dans l’éventualité où elle aurait gain de cause dans le dossier relatif au contrat des compteurs d’eau. La Ville affirme qu’elle est en droit de retenir les paiements dus à Groupe SM jusqu’à ce qu’un jugement soit rendu dans l’affaire relative au contrat des compteurs d’eau.

[98] Dans les circonstances, une ordonnance permettant à la Ville de retenir les sommes dues à Groupe SM jusqu’au dénouement du litige relatif au contrat des compteurs d’eau n’est pas indiquée. Le renvoi du dossier en première instance pour trancher cette question serait, encore une fois, inutile et contraire aux intérêts de la justice.

[99] En effet, non seulement l’ordonnance recherchée par la Ville placerait Thornhill à la merci du résultat de procédures judiciaires longues et complexes — qui, faut-il le rappeler, concernent une créance de plusieurs millions —, mais elle ne serait pas indiquée pour les mêmes motifs que ceux relatifs à la créance PRV. La Ville confond ici l’intérêt public et son propre intérêt en tant qu’organisme public titulaire d’une créance qui n’a jamais été établie. Ensuite, la Ville n’a pas fait montre de diligence. Même si sa demande introductive d’instance dans le dossier relatif au contrat des compteurs d’eau a été introduite le 26 septembre 2018, la Ville a manqué à son obligation de diligence en attendant au 7 novembre 2018 pour signaler son intention d’opérer compensation, alors qu’elle avait connaissance de l’ordonnance initiale au moins depuis le 10 septembre 2018.

VI. Conclusion

[100] For these reasons, we would dismiss this appeal with costs.

English version of the reasons delivered by

[101] BROWN J. (dissenting) — I agree with the majority that a supervising judge has a discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”), as to whether to allow a creditor to effect compensation, or set-off, between pre-initial order and post-initial order debts (“pre-post compensation”). I find, however, that this discretion is not limited solely to the exceptional circumstances the majority describes. While my colleagues in the majority recognize the broad discretion conferred on a supervising judge by the CCAA, in my view they fail to give full effect to it by concluding that pre-post compensation will never be authorized unless there are exceptional circumstances.

[102] Moreover, unlike my colleagues who limit the scope of s. 21 of the CCAA to compensation between debts arising before an initial order is made, I conclude that pre-post compensation is permitted under s. 21 of the CCAA but that it must be subject to the exercise of a supervising judge’s discretion. The majority at the Quebec Court of Appeal (2020 QCCA 438), like the supervising judge (2019 QCCS 2316), erred in relying on the Quebec Court of Appeal’s decision in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, to conclude that pre-post compensation will never be authorized. But, for the reasons set out below, this Court must in my view reject the approach taken in *Kitco*.

[103] Given that the supervising judge in this case did not exercise her discretion, believing herself to be bound by *Kitco*, it would be unwise for this Court to exercise that discretion for the first time in order to determine whether Ville de Montréal

VI. Conclusion

[100] Pour ces motifs, nous sommes d’avis de rejeter le présent pourvoi avec dépens.

Les motifs suivants ont été rendus par

[101] LE JUGE BROWN (dissident) — Je partage l’avis de la majorité selon lequel le juge surveillant possède, en vertu de l’art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« LACC »), le pouvoir discrétionnaire d’autoriser ou non un créancier à opérer compensation entre des dettes pré-ordonnance initiale et post-ordonnance initiale (« compensation pré-post »). Cependant, j’estime que ce pouvoir n’est pas limité aux seules circonstances exceptionnelles décrites par la majorité. En effet, à mon avis, bien qu’ils reconnaissent le large pouvoir discrétionnaire conféré au juge surveillant par la LACC, mes collègues majoritaires échouent à lui donner plein effet en ce qu’ils concluent que la compensation pré-post ne sera jamais autorisée sauf circonstances exceptionnelles.

[102] En outre, contrairement à mes collègues, qui restreignent le champ d’application de l’art. 21 de la LACC à la compensation entre des dettes nées avant la délivrance de l’ordonnance initiale, je conclus que la compensation pré-post est permise en vertu de l’art. 21 de la LACC, mais doit être assujettie à l’exercice du pouvoir discrétionnaire du juge surveillant. Les juges majoritaires de la Cour d’appel du Québec (2020 QCCA 438), ainsi que la juge surveillante (2019 QCCS 2316), s’appuient erronément sur l’arrêt de la Cour d’appel du Québec dans *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, pour conclure que la compensation pré-post ne sera jamais autorisée. Mais, pour les raisons exprimées ci-dessous, l’approche établie dans l’arrêt *Kitco* doit à mon avis être rejetée par la Cour.

[103] Étant donné que la juge surveillante n’a pas exercé son pouvoir discrétionnaire dans la présente affaire, se croyant liée par l’arrêt *Kitco*, il serait mal avisé pour la Cour d’exercer pour la première fois ce pouvoir afin de déterminer si la Ville de Montréal peut

(the “City”) may effect compensation here. I would therefore allow the appeal solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect compensation between the debts incurred by SM Group before the initial order and the amounts owed by the City to SM Group for work performed by the latter after the initial order. I would also allow the appeal so that it can be determined whether compensation is available in respect of the City’s water meter claim against SM Group, as nothing in s. 21 of the CCAA prohibits judicial compensation.

[104] Furthermore, and again unlike my colleagues, I find that there is no need in this appeal to decide whether the City’s claim against SM Group, which derives from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3, must be characterized as a claim based on “false pretences or fraudulent misrepresentation” within the meaning of s. 19(2)(d) of the CCAA. In my view, s. 21 of the CCAA must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). I nonetheless agree with my colleagues that proof by a creditor that it was a victim of fraud within the meaning of s. 19(2)(d) is a factor favouring pre-post compensation that must be weighed by a supervising judge along with the other relevant considerations.

[105] My colleagues consider it necessary to characterize the City’s claim arising from the Voluntary Reimbursement Program (“VRP”) because proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge’s discretion to permit or to deny pre-post compensation (para. 20). As they acknowledge, this is a relevant factor in the exercise of a *supervising judge’s* discretion. As I will explain in greater detail below, whether the City’s VRP claim results from fraud is a question to be decided *by the supervising judge* in

opérer compensation en l’espèce. Par conséquent, j’accueillerais l’appel à seule fin de retourner le dossier devant la Cour supérieure pour qu’il soit décidé si la Ville peut opérer compensation entre les dettes de Groupe SM antérieures à l’ordonnance initiale et les sommes dues par la Ville à Groupe SM pour des travaux réalisés par ce dernier après l’ordonnance initiale. J’accueillerais également l’appel afin qu’il soit décidé si la réclamation de la Ville à l’encontre de Groupe SM à l’égard des compteurs d’eau donne ouverture à compensation, puisque rien dans l’art. 21 de la LACC n’interdit la compensation judiciaire.

[104] Au surplus, et contrairement à mes collègues, j’estime qu’il n’est pas nécessaire dans le présent pourvoi de trancher la question de savoir si la réclamation de la Ville de Montréal à l’encontre de Groupe SM, laquelle s’appuie sur la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3, doit être qualifiée de réclamation fondée sur des « faux-semblants ou la présentation erronée et frauduleuse des faits » au sens de l’al. 19(2)d) de la LACC. À mon avis, l’art. 21 de la LACC doit être interprété comme permettant d’opérer compensation pré-post, peu importe qu’il s’agisse ou non d’une réclamation qui découle d’une fraude au sens de l’al. 19(2)d). Je conviens néanmoins avec mes collègues que le fait pour un créancier de démontrer qu’il a été victime d’une fraude au sens de l’al. 19(2)d) est un facteur favorable à la compensation pré-post qui doit être soupesé par le juge surveillant avec les autres considérations pertinentes.

[105] Mes collègues estiment qu’il est nécessaire de qualifier la créance de la Ville de Montréal issue du Programme de remboursement volontaire (« PRV »), parce que la démonstration du caractère frauduleux de la dette à l’origine d’une créance constitue un facteur pertinent dans l’exercice par le juge surveillant de son pouvoir discrétionnaire de permettre ou non la compensation pré-post (par. 20). Tel qu’ils le reconnaissent, il s’agit d’un facteur pertinent dans l’exercice du pouvoir discrétionnaire *du juge surveillant*. Comme je l’explique

the exercise of her discretion, not by *my colleagues* or this Court.

plus amplement ci-après, la question de savoir si la créance PRV de la Ville de Montréal résulte d'une fraude est une question à laquelle il appartient à *la juge surveillante* de répondre dans le cadre de l'exercice de son pouvoir discrétionnaire, et non à *mes collègues* ou à la Cour.

I. Decision of the Quebec Court of Appeal in *Kitco*

[106] Kitco Metals Inc. specialized in buying scrap gold and extracting fine gold from it for resale. It was subject to special tax rules: it paid the goods and services tax and the Quebec sales tax on the purchase of scrap gold (“inputs”), but the sale of fine gold was not subject to these taxes. Under these special rules, Kitco paid the taxes to its gold suppliers, which were required to remit them to the Agence du revenu du Québec (“Agency”). When the fine gold was sold, Kitco was then entitled to a refund of the taxes paid. The Agency, however, became aware of a fraudulent scheme by which the gold suppliers were not remitting to it the taxes they collected, even though it was refunding Kitco for them.

[107] The Agency, suspecting that Kitco was involved in this fraudulent scheme, sent it a notice of assessment for more than \$300 million (the pre-order debt). On June 7, 2011, the Agency proceeded with compulsory execution on that notice to recover the amounts it considered it was owed. The next day, Kitco filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), thereby staying its creditors’ remedies (s. 69). One month later, it instead obtained an initial order under the CCAA that continued the stay of remedies (stay still in effect at the time of judgment). Meanwhile, Kitco had been continuing its business activities since June 8, 2011: it was paying taxes on inputs and claiming tax refunds from the Agency in accordance with the applicable tax rules. The Agency owed it more than \$1.7 million in refunds (the post-order debt) but applied this amount as compensation against the tax assessments it was claiming from Kitco. Kitco successfully brought a

I. L’arrêt *Kitco* de la Cour d’appel du Québec

[106] Métaux Kitco inc. est une entreprise qui se spécialise dans l’achat de ferraille d’or, dont elle extrait l’or fin afin de pouvoir le revendre. En vertu des règles fiscales, elle est soumise à un régime spécial, c’est-à-dire qu’elle paie la taxe sur les produits et services et la taxe de vente du Québec à l’achat de ferraille d’or (« intrants »), mais la vente d’or fin n’est pas assujettie à ces taxes. Conformément à ce régime spécial, Kitco paie les taxes à ses fournisseurs d’or, lesquels doivent remettre ces taxes à l’Agence du revenu du Québec. Par la suite, lors de la vente d’or fin, Kitco a droit à un remboursement des taxes payées. Cependant, l’Agence constate l’existence d’un stratagème frauduleux suivant lequel les fournisseurs d’or ne lui versent pas les taxes perçues, alors qu’elle rembourse Kitco pour celles-ci.

[107] L’Agence suspecte Kitco d’être impliquée dans ce stratagème frauduleux et lui envoie un avis de cotisation de plus de 300 millions de dollars (soit la dette pré-ordonnance). Le 7 juin 2011, elle entreprend l’exécution forcée de cet avis pour récupérer les sommes qu’elle estime dues. Dès le lendemain, Kitco dépose un avis d’intention de faire une proposition sous le régime de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, c. B-3 (« LFI »), suspendant les recours de ses créanciers (art. 69). Un mois plus tard, elle obtient plutôt, en vertu de la LACC, une ordonnance initiale qui continue la suspension des recours (suspension toujours en vigueur au moment de l’arrêt). Parallèlement, Kitco continue ses activités commerciales depuis le 8 juin 2011 : elle paie des taxes sur les intrants et en réclame le remboursement à l’Agence, conformément au régime fiscal en place. L’Agence lui doit plus de 1,7 million de dollars en remboursement (soit la dette post-ordonnance), mais impute par compensation cette somme sur les

motion in the Superior Court to force the Agency to refund it \$1.7 million on the basis that this compensation was unlawful.

[108] Vézina J.A., writing for the Court of Appeal in *Kitco*, began by explaining that June 8, 2011 was the date of commencement of insolvency proceedings and therefore the date on which the creditors' remedies were stayed and their claims had to be established (para. 34 (CanLII)). He also took the view that the compensation effected by the Agency was unlawful. In his opinion, although s. 21 of the CCAA does not expressly state that compensation can be effected only in respect of debts that arose prior to insolvency proceedings, a literal interpretation of the section must be rejected because it would be incompatible with, among other things, the principle that ordinary creditors must be treated equally (para. 20). Such an interpretation would also undermine the status quo period that companies in financial difficulty need in order to develop a plan of arrangement (para. 43). Vézina J.A. therefore concluded that a literal interpretation would ultimately be contrary to the CCAA's restructuring objective (para. 45).

[109] This conclusion was based in large part on Vézina J.A.'s observation that the schemes of the BIA and the CCAA have [TRANSLATION] "close links" and are two "integrated" schemes, which means that "case law and scholarly opinion can be applied to both equally" (paras. 51-52). Relying on para. 56 of *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, he considered that "[t]he general principles of the BIA preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy" (*Kitco*, at para. 61). On this point, he found that the principles laid down in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, in which the Court stated that set-off is like a form of security, cannot readily be transposed into the civil law, in which compensation is automatic and is effected by operation of law once two debts coexist and are certain, liquid and exigible (para. 65). Lastly, he was of the view that s. 21 of the

cotisations fiscales qu'elle réclame à Kitco. Cette dernière présente avec succès une requête devant la Cour supérieure pour forcer l'Agence à lui rembourser 1,7 million de dollars au motif qu'il s'agit d'une compensation illégale.

[108] Dans l'arrêt *Kitco*, le juge Vézina, qui rédige les motifs de la Cour d'appel, explique d'abord que le 8 juin 2011 constitue la date d'ouverture de la procédure en insolvabilité, et donc la date à laquelle les recours des créanciers sont suspendus et leurs réclamations doivent être établies (par. 34). Il se dit aussi d'avis que la compensation opérée par l'Agence est illégale. Selon lui, bien que l'art. 21 de la LACC ne dise pas expressément que seules les dettes nées avant les procédures en insolvabilité sont susceptibles de compensation, il faut rejeter l'interprétation littérale de cet article, puisqu'elle serait contraire notamment au principe voulant qu'il faille traiter les créanciers ordinaires sur un pied d'égalité (par. 20). Elle fait également échec à la période de statu quo, laquelle est nécessaire aux entreprises en difficultés financières pour leur permettre d'élaborer un plan d'arrangement (par. 43). Il conclut donc qu'une interprétation littérale serait au final contraire à l'objectif de restructuration de la LACC (par. 45).

[109] Cette conclusion s'appuie en grande partie sur le constat du juge Vézina que les régimes de la LFI et de la LACC entretiennent des « liens étroits » et constituent « deux régimes intégrés », de telle sorte que « les enseignements de la jurisprudence et les avis des auteurs sont transposables de l'[un] à l'autre » (par. 51-52). Il s'appuie sur le par. 56 de l'arrêt *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, 2005 CSC 52, [2005] 2 R.C.S. 564, et en retient que « [l]es principes généraux de la LFI s'opposent à toute opération qui aurait pour effet d'accorder une garantie qui n'existait pas avant la faillite » (*Kitco*, par. 61). À cet égard, il estime que les enseignements de l'arrêt *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, qui a précisé que la compensation s'apparentait à une forme de garantie, sont difficilement transposables en droit civil où la compensation est automatique et s'opère de plein droit dès que deux dettes coexistent et sont

CCAA and s. 97(3) of the *BIA* identify the point in time when compensation may be effected, that is, on the date on which the creditors' "provable claims" must be established, which is the date of commencement of insolvency proceedings:

[TRANSLATION] In my opinion, sections 21 *CCAA* and 97(3) *BIA*, which provide that the "law of set-off or compensation applies to all claims. . .", thereby identify the point in time when compensation is effected, or in other words, the moment at which the claims must be established: it is on the date of [commencement of proceedings] that temporal reciprocity is established. [para. 82]

[110] Vézina J.A. found, at para. 78, that the question of what constitutes a "provable claim" is answered by s. 121(1) of the *BIA*, which refers to "[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt".

[111] With respect, I am of the view that several errors were made in *Kitco*. First, Vézina J.A. erred in relying on this Court's judgment in *D.I.M.S. Construction* to reach the conclusion that pre-post compensation can never be allowed under the *CCAA*, even though that judgment was rendered in the context of a bankruptcy under the *BIA*. Despite the similarities between the insolvency schemes established by the *CCAA* and the *BIA*, these are two different statutes, and their differences are significant in the case at bar. Secondly, *Kitco* was based on an inappropriate narrow interpretation of s. 21 of the *CCAA* that disregarded the "flexible" nature the *CCAA* is recognized as having (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 337) as well as the broad discretion conferred on supervising judges, whereas courts of other Canadian provinces have held that pre-post set-off can be permitted. Thirdly, *Kitco* was decided in a context where a company in financial difficulty was actually restructured, and it

certaines, liquides et exigibles (par. 65). Finalement, il considère que l'art. 21 de la *LACC* et le par. 97(3) de la *LFI* précisent à quel moment peut s'opérer la compensation, soit à la date où doivent être établies les « réclamations prouvables » des créanciers, c'est-à-dire le jour de l'ouverture des procédures d'insolvabilité :

À mon avis, les articles 21 *L.a.c.c.* et 97 (3) *L.f.i.* qui édictent que « les règles de la compensation s'appliquent à toutes les réclamations. . . », précisent par là le moment où la compensation s'opère, soit au moment où doivent être établies les réclamations; c'est au jour d'Ouverture que s'établit la réciprocité temporelle. [par. 82]

[110] Le juge Vézina estime, au par. 78, que la réponse à la question de savoir en quoi consiste une « réclamation prouvable » se trouve au par. 121(1) de la *LFI*, c'est-à-dire « [t]outes créances et tous engagements, présents ou futurs, auxquels le failli est assujéti à la date à laquelle il devient failli, ou auxquels il peut devenir assujéti avant sa libération, en raison d'une obligation contractée antérieurement à cette date ».

[111] Avec égards, je suis d'avis que plusieurs erreurs ont été commises dans l'arrêt *Kitco*. Premièrement, le juge Vézina s'est erronément appuyé sur l'arrêt de la Cour dans *D.I.M.S. Construction* pour arriver à la conclusion que la compensation pré-post ne pouvait jamais être autorisée en vertu de la *LACC*, alors que cet arrêt a été rendu dans un contexte de faillite sous le régime de la *LFI*. Malgré les similitudes entre les régimes d'insolvabilité établis par la *LACC* et la *LFI*, ces deux lois sont distinctes — et de manière significative en l'espèce. Deuxièmement, l'arrêt *Kitco* repose sur une interprétation restrictive et inappropriée de l'art. 21 de la *LACC*, qui fait fi du caractère « souple » (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 14) et [TRADUCTION] « flexible » (R. J. Wood, *Bankruptcy and Insolvency Law* (2^e éd. 2015), p. 337) reconnu à la *LACC* ainsi que du vaste pouvoir discrétionnaire dont le juge surveillant est investi, alors que les tribunaux d'autres provinces canadiennes ont jugé que la compensation pré-post pouvait être permise. Troisièmement, l'arrêt *Kitco* a

cannot readily be transposed into a context such as the one in the instant case, which instead involves the liquidation of a company's assets and contracts.

A. Fundamental Differences Between the Two Insolvency Schemes

[112] It is important to underscore the fundamental differences between the scheme established by the CCAA and the one established by the BIA, differences that highlight that, under the CCAA scheme, the mutuality of debts is maintained and supervising judges have a broad discretion that allows them to authorize pre-post compensation. I do not question the notion that these two schemes must be viewed as “an integrated body of insolvency law” and that legislative efforts to harmonize them have been going on for several decades (*Century Services*, at paras. 19-24 and 78). As I recount below, however, there remain many differences between the two schemes (Wood, at p. 337).

[113] The three principal Canadian statutes dealing with insolvency, the CCAA, the BIA and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (“WURA”), have the following main objectives: “. . . to treat the claims of creditors fairly and equitably, to protect the public interest, to create a fair, timely and cost-effective process, and to achieve a balance of benefit and cost in deciding whether to restructure or liquidate a business, maximizing enterprise value” (J. P. Sarra, “The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10, objectives referred to with approval by the Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522, at para. 40). More specifically, the CCAA’s main objective is the financial and commercial rehabilitation of an insolvent company through the filing of a plan of arrangement with its creditors (Wood, at p. 338; B. Boucher, “Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*”, in *JurisClasseur Québec — Collection*

été rendu dans un contexte de restructuration réelle d’une entreprise en difficultés financières, et il est difficilement transposable dans un contexte comme celui qui nous occupe, où il s’agit plutôt d’une liquidation des actifs et des contrats d’une entreprise.

A. Les distinctions fondamentales entre les deux régimes d’insolvabilité

[112] Il importe de souligner les différences fondamentales entre le régime établi par la LACC et celui établi par la LFI, lesquelles font ressortir, sous le régime de la LACC, le maintien de la réciprocité des dettes ainsi que le vaste pouvoir discrétionnaire permettant au juge surveillant d’autoriser la compensation pré-post. Je ne mets pas en doute l’idée que ces deux régimes doivent être perçus comme « un ensemble intégré de règles du droit de l’insolvabilité » et que des efforts législatifs visant à harmoniser les deux régimes ont été déployés depuis plusieurs décennies (*Century Services*, par. 19-24 et 78). Toutefois, comme nous le verrons ci-dessous, de nombreuses différences persistent entre ces deux régimes (Wood, p. 337).

[113] Les trois principales lois canadiennes en matière d’insolvabilité, c’est-à-dire la LACC, la LFI et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11 (« LLR »), ont comme objectifs fondamentaux : [TRADUCTION] « . . . le traitement juste et équitable des réclamations des créanciers, la protection de l’intérêt public, la création d’un processus juste, opportun et efficient, et, lors de la prise de la décision de restructurer ou de liquider une entreprise, l’établissement d’un équilibre coûts-avantages maximisant la valeur de celle-ci » (J. P. Sarra, « The Oscillating Pendulum : Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10, objectifs mentionnés avec approbation par la Cour dans *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 40). La LACC a plus particulièrement comme objectif principal de permettre à une entreprise insolvable de se rétablir financièrement et commercialement par le dépôt d’un plan d’arrangement auprès de ses créanciers (Wood, p. 338; B. Boucher, « Procédures en vertu

Droit des affaires — Faillite, insolvabilité et restructuration (loose-leaf), by S. Rousseau, ed., fasc. 14, at Nos. 2 and 8). In seeking an initial order, an insolvent company shields itself from its creditors, staying their remedies for a certain period so that all its energy can be channeled into preparing a plan of arrangement for a viable recovery (Boucher, at No. 2).

[114] For these reasons, the scheme established by the CCAA is flexible and allows creative solutions to be put forward to achieve the objective mentioned above, the restructuring of a financially distressed company, in contrast to the BIA, which provides a set of pre-established rules (Boucher, at No. 8; Wood, at p. 337). The CCAA is therefore characterized as “remedial” legislation (J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed. 2013), at p. 500; Boucher, at No. 3).

[115] The Court has found that the CCAA’s provisions must be interpreted expansively to enable its remedial objectives to be achieved, and in particular to allow a company to continue its activities and to avoid the social and economic losses that can result from its liquidation (*Century Services*, at para. 70). Because of the remedial scope of the CCAA, a “broad” discretion is also conferred on supervising judges by s. 11 of the CCAA (*Callidus*, at para. 48; *Century Services*, at para. 14). This section provides that a supervising judge may make “any order that [the judge] considers appropriate”, although it specifies that such an order must be consistent with the restrictions set out in the CCAA and must be “appropriate” in light of the circumstances of each case. As this Court noted in *Callidus*, s. 11 is in a sense the “engine” of the CCAA (para. 48, quoting *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36). This discretion granted to supervising judges under the CCAA allows for the implementation of “creative and effective” solutions (*Century Services*, at para. 21, quoting Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies’ Creditors*

de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, n° 2 et 8). En demandant une ordonnance initiale, l’entreprise insolvable se met à l’abri de ses créanciers, suspendant ainsi leurs recours pendant une certaine période, afin de pouvoir concentrer toutes ses énergies sur la confection d’un plan d’arrangement permettant une relance viable (Boucher, n° 2).

[114] Pour ces raisons, le régime établi par la LACC est flexible et permet de mettre de l’avant des solutions créatives afin d’atteindre l’objectif énoncé précédemment, soit la restructuration d’une entreprise en difficultés financières, par opposition à la LFI, qui prévoit un ensemble de règles préétablies (Boucher, n° 8; Wood, p. 337). En tant que telle, la LACC est une loi qualifiée de « réparatrice » (Boucher, n° 3; J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2^e éd. 2013), p. 500).

[115] La Cour a reconnu que les dispositions de la LACC doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, notamment permettre la survie des activités de l’entreprise et éviter les pertes sociales et économiques pouvant résulter de la liquidation de cette dernière (*Century Services*, par. 70). En raison de la portée réparatrice de la LACC, un « vaste » pouvoir discrétionnaire est également conféré au juge surveillant par l’art. 11 de la LACC (*Callidus*, par. 48; *Century Services*, par. 14). Cet article prévoit qu’un juge surveillant peut rendre « toute ordonnance qu’il estime indiquée », mais précise toutefois qu’une telle ordonnance ne peut être contraire aux restrictions prévues par la LACC et qu’elle doit être « indiquée » au regard des circonstances de chaque affaire. La Cour a indiqué dans l’arrêt *Callidus* que l’art. 11 est en quelque sorte le « moteur » de la LACC (par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36). Ce pouvoir discrétionnaire conféré au juge surveillant en vertu de la LACC permet la mise en place de solutions « créatives et efficaces » (*Century Services*, par. 21, citant Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la*

Arrangement Act (2002), at p. 41), in recognition of the “positional advantage” gained by supervising judges, who “acquir[e] extensive knowledge and insight into the stakeholder dynamics and the business realities of [CCAA] proceedings” (*Callidus*, at paras. 47-48). Examples of “creative” solutions adopted by courts under the CCAA include “security for debtor in possession financing or super-priority charges on the debtor’s assets” and the release of “claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors” (*Century Services*, at para. 62).

[116] As the Court again recently recognized, the broad discretion conferred on supervising judges by s. 11 of the CCAA enables them to propose solutions “that respond to the circumstances of each case and ‘meet contemporary business and social needs’” (*Callidus*, at para. 48, quoting *Century Services*, at para. 58). This broad discretion is unique to the CCAA and has no equivalent in the BIA, which is based instead on pre-established rules designed to apply to a range of situations. This is, therefore, one major difference between the two insolvency schemes.

[117] Another major difference between these two schemes is that the CCAA allows a company that has obtained an initial order to continue its business activities during the restructuring or reorganization period (*Callidus*, at para. 41). The continuation of a struggling company’s business activities averts “the social and economic losses resulting from liquidation of an insolvent company” (*Century Services*, at para. 70) and “preserves going-concern value” (*Callidus*, at para. 46). Accordingly, when an insolvent company has recourse to the CCAA, it is not divested of its property in favour of a third party, unlike with the measures put in place under the BIA that vest the bankrupt’s property in a trustee (s. 71 of the BIA). There is thus no loss of mutuality under

Loi sur la faillite et l’insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies (2002), p. 50), en reconnaissance de la « position avantageuse » du juge surveillant, lequel « acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure [fondée sur la LACC] » (*Callidus*, par. 47-48). À titre de solutions « créatives » retenues par les tribunaux sous le régime de la LACC, mentionnons la « constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l’actif du débiteur », ainsi que la libération de « tiers des actions susceptibles d’être intentées contre eux, dans le cadre de l’approbation d’un plan global d’arrangement et de transaction, malgré les objections de certains créanciers dissidents » (*Century Services*, par. 62).

[116] Comme l’a reconnu la Cour encore récemment, le vaste pouvoir discrétionnaire conféré au juge surveillant par l’art. 11 de la LACC permet à ce dernier de mettre de l’avant des solutions « susceptibles de répondre aux circonstances de chaque cas et de “[s’adapter] aux besoins commerciaux et sociaux contemporains” » (*Callidus*, par. 48, citant *Century Services*, par. 58). Ce vaste pouvoir discrétionnaire du juge surveillant est unique à la LACC et n’a pas d’équivalent dans la LFI, laquelle est plutôt fondée sur des règles préétablies visant à régir une gamme de situations. Il s’agit donc là d’une distinction majeure entre les deux régimes d’insolvabilité.

[117] Une autre différence majeure entre ces deux régimes est le fait que la LACC permet à une entreprise, après qu’elle a obtenu une ordonnance initiale, de poursuivre ses activités commerciales pendant la période de restructuration ou de réorganisation (*Callidus*, par. 41). La poursuite des activités commerciales de l’entreprise en difficulté évite « les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable » (*Century Services*, par. 70) et permet de « protéger sa valeur d’exploitation » (*Callidus*, par. 46). Ainsi, lorsque l’entreprise insolvable a recours à la LACC, elle n’est pas dessaisie de ses biens au profit d’un tiers, contrairement aux mesures mises en place en vertu de la LFI, suivant lesquelles le syndic obtient la

the CCAA. The status of debtor or creditor of the insolvent company remains unchanged and is not bestowed on a third party.

[118] This mutuality, which survives the initial order, is what makes compensation possible under the CCAA, unlike under the BIA. This same fundamental difference between the CCAA scheme and the BIA scheme also played a crucial role in *D.I.M.S. Construction*, on which Vézina J.A. largely relied in *Kitco*. In *D.I.M.S. Construction*, this Court had to determine whether the schemes established in two Quebec labour law statutes subverted the scheme of distribution provided for by the BIA. Those two statutes created a similar mechanism that required an employer subject to one of them to pay an assessment due from a contractor whose services it had retained. Once the employer had paid the assessment, it was entitled to retain the amount it had paid out of any sums it owed to the contractor, thereby effecting compensation (para. 2). In that case, three employers had been directed to pay the assessments of a contractor, D.I.M.S. Construction inc., before it went bankrupt on April 1, 1999, but only one of them had done so before that date (paras. 3-4). D.I.M.S. Construction's trustee in bankruptcy, relying on the Court's judgment in *Husky Oil*, asked the Court to declare that two sections of the statutes in question were inoperable in the context of a bankruptcy under the BIA (para. 5).

[119] In her analysis, Deschamps J. began by discussing s. 97(3) of the BIA, which concerns compensation, and made two relevant observations. First, because s. 97(3) applies to claims against a bankrupt's estate, a creditor must meet the conditions set out in s. 121(1) of the BIA, which means that, in order to effect compensation, the creditor must "prove the bankrupt was subject to a debt by reason of an obligation incurred before the bankruptcy" (para. 40 (emphasis added)). Second, s. 97(3) states that compensation is effected in the same manner as if the

saisine des biens du failli (art. 71 de la LFI). Il n'y a donc pas de perte de réciprocité sous le régime de la LACC. La qualité de débitrice ou de créancière de l'entreprise insolvable demeure inchangée et n'est pas octroyée à un tiers.

[118] Cette réciprocité, qui subsiste au-delà de l'ordonnance initiale, est ce qui rend possible la compensation en vertu de la LACC, par opposition à la LFI. En outre, cette même distinction fondamentale entre le régime de la LACC et celui de la LFI a joué un rôle crucial dans l'arrêt *D.I.M.S. Construction*, sur lequel s'est en grande partie appuyé le juge Vézina dans l'arrêt *Kitco*. En effet, dans l'arrêt *D.I.M.S. Construction*, la Cour devait décider si les régimes législatifs établis dans deux lois québécoises en matière de droit du travail portaient atteinte au plan de répartition prévu par la LFI. Ces deux lois établissaient un mécanisme similaire par lequel un employeur assujéti à l'une de ces lois devait payer la cotisation due par un entrepreneur dont il retenait les services. Une fois la cotisation payée par l'employeur, ce dernier avait le droit de retenir sur les sommes qu'il devait à l'entrepreneur le montant de la cotisation qu'il avait déboursé, et donc d'opérer compensation (par. 2). Dans cette affaire, trois employeurs avaient été sommés de payer les cotisations de l'entrepreneur D.I.M.S. Construction inc. avant sa faillite le 1^{er} avril 1999, mais un seul d'entre eux avait payé la cotisation avant cette date (par. 3-4). Le syndic à la faillite de D.I.M.S. Construction demandait à la Cour de déclarer inopérants deux articles de ces lois dans le cadre d'une faillite sous le régime de la LFI en invoquant l'arrêt de la Cour dans *Husky Oil* (par. 5).

[119] Dans son analyse, la juge Deschamps s'attarde d'abord au par. 97(3) de la LFI portant sur la compensation et fait deux constats utiles. Premièrement, comme le par. 97(3) s'applique aux réclamations visant l'actif du failli, le créancier doit remplir les conditions prévues au par. 121(1) de la LFI, c'est-à-dire que, pour qu'il puisse opérer compensation, il doit « prouver une créance à laquelle le failli était assujéti en raison d'une obligation contractée antérieurement à la faillite » (par. 40 (je souligne)). Deuxièmement, le par. 97(3) précise que

bankrupt were a plaintiff or a defendant in a lawsuit and, exceptionally, makes it possible to proceed “as if the bankrupt’s patrimony had not vested in the trustee as a result of the bankruptcy” (para. 41).

[120] Deschamps J. concluded that there are three possible scenarios in Quebec civil law, depending on when an employer pays an assessment due from a contractor: (1) the payment is made by the employer *before* the bankruptcy, and the debts become certain, liquid and exigible *before* the bankruptcy; (2) the payment is made *before* the bankruptcy and the employer is in debt to the bankrupt contractor, but one of the conditions for legal compensation is not met; and (3) the payment is made *after* the bankruptcy (para. 42). Regarding the third scenario — one that also brings into play art. 1651 of the *Civil Code of Québec*, which provides that a person subrogated to the rights of another (the employer in that case) does not have more rights than the subrogating creditor — Deschamps J. concluded that when the employer pays after the contractor’s bankruptcy, “[t]he dual status of creditor and debtor”, and therefore the mutuality of the debts, does not arise until *after* the bankruptcy (para. 51). It must therefore be inferred that s. 97(3) of the *BIA*, read in conjunction with ss. 121, 136(3) and 141 of the *BIA*, requires that “the mutual debts come into existence *before* the bankruptcy” in order for compensation to be effected (para. 55 (emphasis added)). Deschamps J. added at para. 56 that, according to the rules specific to the bankruptcy scheme under the *BIA*, the trustee may object to the substitution of a creditor (the employer in that case) if this has the effect of giving the creditor a security that did not exist at the time of the bankruptcy:

What distinguishes a pre-bankruptcy payment from a post-bankruptcy payment is that, in the former case, the substitution of creditors takes place before the moment when the trustee acquires the bankrupt’s property. In the case of a post-bankruptcy payment, the substitution occurs after the bankruptcy, and the trustee can object to it. The general principles of the *BIA* preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy. [Emphasis added.]

la compensation s’opère de la même manière que si le failli était demandeur ou défendeur d’une action en justice, et elle permet exceptionnellement de faire « comme si le patrimoine du failli n’avait pas, par la faillite, été dévolu au syndic » (par. 41).

[120] La juge Deschamps conclut que trois scénarios sont possibles en droit civil québécois en fonction du moment où l’employeur paie la cotisation due par l’entrepreneur : (1) le paiement est fait par l’employeur *avant* la faillite et les dettes sont devenues certaines, liquides et exigibles *avant* la faillite, (2) le paiement est fait *avant* la faillite, l’employeur est endetté envers l’entrepreneur failli, mais l’une des conditions de la compensation légale n’est pas satisfaite et (3) le paiement est fait *après* la faillite (par. 42). Relativement au troisième scénario, lequel fait également interagir l’art. 1651 du *Code civil du Québec*, qui prévoit qu’une personne subrogée dans les droits d’une autre (ici, l’employeur) n’a pas plus de droits que le subrogeant, la juge Deschamps conclut que lorsque l’employeur paie après la faillite de l’entrepreneur, « [l]a double qualité de créancier et de débiteur » et donc la réciprocité des dettes ne survient qu’*après* la faillite (par. 51). Par conséquent, il faut en déduire que, lorsque lu en conjonction avec les art. 121, 136(3) et 141 de la *LFI*, le par. 97(3) de la *LFI* prévoit que « les créances mutuelles doivent avoir pris naissance *avant* la faillite » pour qu’il y ait compensation (par. 55 (je souligne)). La juge Deschamps ajoute, au par. 56, qu’en vertu des règles propres au régime de la faillite sous la *LFI*, le syndic peut s’opposer à la substitution du créancier (ici, l’employeur), si cela a pour effet de conférer à ce dernier une garantie qui n’existait pas au moment de la faillite :

Ce qui distingue le paiement avant la faillite du paiement après la faillite est le fait que, dans le premier cas, la substitution de créancier a lieu avant le moment où le syndic acquiert les biens du failli. Lorsque le paiement est fait après la faillite, la substitution est postérieure à la faillite et le syndic est en mesure de s’y opposer. Les principes généraux de la *LFI* s’opposent à toute opération qui aurait pour effet d’accorder une garantie qui n’existait pas avant la faillite. [Je souligne.]

[121] The argument is a simple one. For legal compensation to be effected, in addition to the fact that a claim must be shown to be certain, liquid and exigible, [TRANSLATION] “two persons must be reciprocally debtor and creditor of each other” (*Code civil du Québec: Annotations — Commentaires 2020-2021* (5th ed. 2020), by B. Moore, ed., et al., at p. 1558). This is one of the four essential conditions for compensation to be possible. This mutuality of claims is severed when an insolvent company becomes bankrupt, because a trustee in bankruptcy is appointed and the company’s property is vested in the trustee (s. 71 of the *BIA*). On the date of the initial bankruptcy event, the bankrupt company loses its status as creditor or debtor in favour of the trustee. As well, the bankrupt company ceases its business activities and normally does not incur any obligations after the bankruptcy. This is why claims provable under the *BIA* must be established on the date of the initial bankruptcy event and why, logically, compensation cannot be effected between pre- and post-bankruptcy debts (ss. 97(3) and 121(1)). However, as the intervenor Union des municipalités du Québec rightly noted at the hearing, the situation is very different when an insolvent company applies for an initial order under the *CCAA*, since the company continues its business activities while at the same time seeking a stay of its creditors’ remedies (transcript, at pp. 48-49). Under the *CCAA*, the property of the company applying for an initial order is not vested in a monitor. The mutuality of debts remains intact, as the company continues to be the debtor or creditor of a claim (see, on this point, L. Morin and G.-P. Michaud, “Set-Off and Compensation in Insolvency Restructuring under the *BIA/CCAA*: After the *Kitco* and *Beyond the Rack* Decisions”, in Sarra and Romaine, *Annual Review of Insolvency Law 2016*, 311, at pp. 343-44; see also A. R. Anderson, T. Gelbman and B. Pullen, “Recent Developments in the Law of Set-off”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 23-25 (these authors acknowledge that an insolvent company’s property is not vested in a monitor under the *CCAA* and that the mutuality of debts is not severed, but they advocate having the courts interpret the *CCAA* in such a way as to put an end to this mutuality)).

[121] L’argument est simple. Pour qu’il y ait compensation légale, en sus du fait que le caractère certain, liquide et exigible de la créance doit être démontré, « deux personnes doivent être réciproquement débitrices et créancières l’une de l’autre » (*Code civil du Québec : Annotations — Commentaires 2020-2021* (5^e éd. 2020), par B. Moore, dir., et autres, p. 1558). Il s’agit là d’une des quatre conditions essentielles pour qu’il soit possible d’opérer compensation. Cette réciprocité des créances cesse d’exister lorsqu’une entreprise insolvable devient faillie, puisqu’un syndic à la faillite est nommé et obtient la saisine de ses biens (art. 71 de la *LFI*). La qualité de créancière ou de débitrice de l’entreprise qui devient faillie s’éteint au profit du syndic le jour de l’ouverture de la faillite. De plus, l’entreprise faillie cesse ses opérations commerciales et n’encourt normalement pas d’obligations post-faillite. C’est pourquoi les réclamations prouvables visées par la *LFI* doivent être établies le jour de l’ouverture de la faillite, et il ne peut logiquement y avoir compensation entre des dettes pré et post-faillite (par. 97(3) et 121(1)). Or, comme l’a fait remarquer avec justesse l’intervenante l’Union des municipalités du Québec à l’audience, la situation est tout autre lorsqu’une entreprise insolvable demande la délivrance d’une ordonnance initiale en vertu de la *LACC*, puisqu’elle continue ses activités commerciales, tout en demandant la suspension des recours de ses créanciers (transcription, p. 48-49). Sous le régime de la *LACC*, le contrôleur n’obtient pas la saisine des biens de l’entreprise ayant demandé une ordonnance initiale. La réciprocité des dettes subsiste, l’entreprise demeurant débitrice ou créancière d’une réclamation (voir à ce sujet L. Morin et G.-P. Michaud, « Set-Off and Compensation in Insolvency Restructuring under the *BIA/CCAA* : After the *Kitco* and *Beyond the Rack* Decisions », dans Sarra et Romaine, *Annual Review of Insolvency Law 2016*, 311, p. 343-344; voir aussi A. R. Anderson, T. Gelbman et B. Pullen, « Recent Developments in the Law of Set-off », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2009* (2010), 1, p. 23-25 (ces auteurs reconnaissent que la saisine des biens de l’entreprise insolvable n’est pas dévolue au contrôleur dans le cadre de la *LACC*, et que la réciprocité des dettes n’est pas éteinte, mais prèchent pour que la *LACC* soit interprétée par les tribunaux de manière à mettre fin à cette réciprocité)).

[122] These two fundamental differences between the CCAA scheme and the BIA scheme suffice to explain why this Court should reject the approach proposed in *Kitco*. As we will see below, courts of other Canadian provinces have relied in part on these differences between the two schemes to find that s. 21 of the CCAA, unlike the equivalent provisions in the BIA (s. 97(3)) and the WURA (s. 73(1)), does not prohibit pre-post set-off.

B. Courts of Other Canadian Provinces Have Recognized the Possibility of Effecting Pre-post Set-off

[123] For two reasons, the right to effect set-off under the CCAA has been a subject of debate among Canadian courts. First, before the legislative reform of 1997 (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12) and the addition of s. 21 (formerly s. 18.1), this right was not formally recognized in the CCAA. Secondly, questions relating to the framework for the right to effect set-off have arisen in recent decades, particularly with regard to the possibility of staying this right temporarily after an initial order has been made (CCAA, s. 11.02(1); see *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6 (“*Tungsten No. 1*”) (decision on application for leave to appeal), aff'd 2015 BCCA 426, 378 B.C.A.C. 116 (“*Tungsten No. 2*”); *Re Just Energy Corp.*, 2021 ONSC 1793); or of directly restricting the right in the language of an initial order under the CCAA (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

[124] More specifically, the question now before this Court is whether s. 21 of the CCAA allows pre-post compensation. This question is all the more relevant in the context of a restructuring process under

[122] Ces deux distinctions fondamentales entre les régimes de la LACC et de la LFI suffisent à expliquer pourquoi l'approche mise de l'avant dans l'arrêt *Kitco* doit être rejetée par la Cour. Comme nous le verrons ci-après, les tribunaux d'autres provinces canadiennes se sont notamment appuyés sur ces distinctions entre les deux régimes pour conclure que l'art. 21 de la LACC, contrairement aux dispositions équivalentes dans la LFI (par. 97(3)) et la LLR (par. 73(1)), n'interdit pas la compensation pré-post.

B. Les tribunaux d'autres provinces canadiennes ont reconnu la possibilité d'opérer compensation pré-post

[123] Le droit d'opérer compensation en vertu de la LACC a fait l'objet de débats dans la jurisprudence canadienne, et ce, pour deux raisons. D'abord, avant la réforme législative de 1997 (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu*, L.C. 1997, c. 12) et l'ajout de l'art. 21 (autrefois l'art. 18.1), le droit d'opérer compensation n'était pas formellement reconnu dans la LACC. Ensuite, des questions portant sur l'encadrement du droit d'opérer compensation se sont soulevées dans les dernières décennies, notamment en ce qui a trait à la possibilité de suspendre temporairement le droit d'opérer compensation à la suite de la délivrance d'une ordonnance initiale (LACC, par. 11.02(1); voir *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6 (« *Tungsten n° 1* ») (décision sur la demande d'autorisation d'appel), conf. par 2015 BCCA 426, 378 B.C.A.C. 116 (« *Tungsten n° 2* »); *Re Just Energy Corp.*, 2021 ONSC 1793); ou de restreindre ce droit directement dans le texte d'une ordonnance initiale fondée sur la LACC (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

[124] Plus particulièrement, la question qui nous occupe ici est celle de savoir si l'art. 21 de la LACC permet d'opérer compensation pré-post. Cette question se pose avec une plus grande acuité dans le

the CCAA because the insolvent company continues its business activities.

[125] One of the first cases in which this question was considered after the 1997 legislative reform was *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, a judgment of Farley J. of the Ontario Superior Court of Justice. There, Farley J. had to decide whether a paragraph included in an initial order whose purpose was to limit the right of Air Canada's creditors to effect set-off should be varied.² Air Canada essentially argued that under the CCAA, as under the BIA, legal set-off cannot be permitted between pre- and post-order debts (paras. 10-11). Because the BIA provides, in s. 71 (formerly s. 71(2)), that the bankrupt's property vests in the trustee on the date of the initial bankruptcy event, Farley J. concluded that there is no longer any mutuality between a creditor and a bankrupt debtor following a bankruptcy, despite such mutuality being a necessary condition for set-off:

In a bankruptcy, the trustee is inserted into the proceedings. Post-bankruptcy dealings of a creditor with the trustee in bankruptcy do not involve the same party, namely the debtor before the condition of bankruptcy. . . . Thus, creditors who incur post-bankruptcy obligations to trustees in bankruptcy cannot claim legal set-off to avoid paying such obligations by setting-off such obligations against their proven (pre-bankruptcy) claims against the bankrupt. The same parties are not involved so there cannot be mutual cross-obligations. [Emphasis in original; para. 14.]

[126] Farley J. next considered Air Canada's second argument, that s. 21 (then s. 18.1) of the CCAA must be interpreted similarly to s. 73(1) of the WURA (at paras. 16-17), which provides that the

cadre d'un processus de restructuration mené sous le régime de la LACC, puisque l'entreprise insolvable continue ses opérations commerciales.

[125] L'une des premières affaires dans lesquelles cette question a été examinée, après la réforme législative de 1997, est la décision *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, rendue par le juge Farley de la Cour supérieure de justice de l'Ontario. Dans cette décision, le juge Farley devait déterminer si un paragraphe inséré dans l'ordonnance initiale et qui visait à limiter le droit pour les créanciers d'Air Canada d'opérer compensation devait être modifié². Essentiellement, Air Canada plaidait que la compensation légale prévue par la LACC ne pouvait être autorisée entre des dettes pré et post-ordonnance, comme c'est le cas en vertu de la LFI (par. 10-11). Puisque la LFI prévoit que, à l'ouverture de la faillite, les biens du failli sont dévolus au syndic en vertu de l'art. 71 (autrefois le par. 71(2)), le juge Farley a conclu qu'il n'y a alors plus de réciprocité entre un créancier et un débiteur failli post-faillite, condition pourtant nécessaire pour qu'il soit possible d'opérer compensation :

[TRADUCTION] *Lors d'une faillite*, le syndic est ajouté à l'instance. Lorsqu'un créancier effectue des opérations post-faillite avec le syndic de faillite, il ne traite pas avec la même partie, c'est-à-dire avec le débiteur avant la faillite. [. . .] Par conséquent, le créancier qui contracte des obligations post-faillite envers un syndic de faillite ne peut invoquer la compensation légale pour éviter d'acquitter de telles obligations en opérant compensation entre celles-ci et ses réclamations (pré-faillite) contre le failli dont il a fait la preuve. Comme ce ne sont pas les mêmes parties qui sont concernées, il ne saurait y avoir d'obligations réciproques. [En italique dans l'original; par. 14.]

[126] Ensuite, le juge Farley a analysé le second argument d'Air Canada qui prétendait que l'art. 21 de la LACC (alors l'art. 18.1), devait être interprété de façon similaire au par. 73(1) de la LLR (par. 16-17),

² The paragraph in question read as follows: "THIS COURT ORDERS that persons may exercise only such rights of set off as are permitted under Section 18.1 of the CCAA as of the date of this order. For greater certainty, no person may set off any obligations of an Applicant to such person which arose prior to such date" (para. 2). The last sentence was particularly problematic.

² Le paragraphe en question était rédigé ainsi : [TRADUCTION] « LA COUR ORDONNE que seuls peuvent être exercés par les personnes concernées les droits d'opérer compensation qui sont autorisés par l'article 18.1 de la LACC à compter de la date de la présente ordonnance. Il est entendu que nul ne peut opérer compensation sur des obligations d'un Demandeur envers une telle personne nées avant la date de la présente ordonnance. » (par. 2). La dernière phrase posait particulièrement problème.

law of set-off applies to “all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company”. He rejected this argument for several reasons, emphasizing in particular the differences between the words of s. 73(1) of the *WURA* and those of s. 21 of the *CCAA*. For example, s. 21 does not provide that set-off must be between claims accruing due as of the date an initial order is made. Farley J. noted that these differences in wording reflect a choice made by Parliament, which did not intend to enact identical set-off provisions in Canada’s three insolvency statutes (para. 23). For these reasons, he ordered that the paragraph of the order restricting the right to effect set-off be varied (para. 24).

[127] Although he struck out the part of the initial order that precluded pre-post set-off, Farley J. nonetheless stayed set-off until Air Canada’s situation was more stable in order to avoid the disruptive consequences that would result from allowing set-off during the status quo period. He suggested that the best time to effect set-off would be in conjunction with the formation of a plan of arrangement (para. 25).

[128] My colleagues argue (at para. 77) that “*Air Canada* and *Tungsten* [which I will discuss below] did not determine whether pre-post compensation is consistent with the interpretation and objectives of the *CCAA*, let alone establish a framework for the exercise of this right by creditors.” This, however, ignores that *Air Canada* is widely recognized as being authoritative and as standing for the proposition that mutuality is not severed by an initial order made under the *CCAA*, which means that pre-post set-off or compensation is possible but is subject to a supervising judge’s power to stay it (see R. Thornton, “Air Canada and Stelco: Legal Developments and Practical Lessons”, in J. P. Sarra, ed., *Annual Review of Insolvency Law* 2006 (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R.

lequel prévoit que la compensation s’applique à « toutes les réclamations sur l’actif d’une compagnie et à toutes les procédures en recouvrement de créances d’une compagnie, échues ou devenues exigibles à l’ouverture de la liquidation de la compagnie ». Le juge Farley a rejeté cet argument pour plusieurs raisons, insistant notamment sur les différences entre le texte du par. 73(1) de la *LLR* et celui de l’art. 21 de la *LACC*. Par exemple, ce dernier article ne prévoit pas que la compensation doit s’effectuer entre des réclamations devenues exigibles à la date de la délivrance de l’ordonnance initiale. Le juge Farley a souligné que ces différences rédactionnelles reflètent le choix du législateur, lequel n’a pas voulu adopter des dispositions législatives identiques en matière de compensation dans les trois lois canadiennes en matière d’insolvabilité (par. 23). Pour ces raisons, il a ordonné la modification du paragraphe de l’ordonnance qui limitait le droit d’opérer compensation (par. 24).

[127] Bien qu’il ait radié la partie de l’ordonnance initiale qui empêchait la compensation pré-post, le juge Farley a néanmoins suspendu la mise en œuvre de la compensation jusqu’à ce que la situation d’Air Canada se soit davantage stabilisée, afin d’éviter les conséquences perturbatrices qu’entraînerait le fait de permettre la compensation pendant la période de statu quo. Il a suggéré que le meilleur moment pour opérer compensation serait lors de la formulation d’un plan d’arrangement (par. 25).

[128] Mes collègues prétendent (au par. 77) que « les affaires *Air Canada* et *Tungsten* [que je décris ci-dessous] n’ont pas tranché la question de savoir si la compensation pré-post est conforme à l’interprétation et aux objectifs de la *LACC*, et encore moins établi les balises entourant l’exercice de ce droit par des créanciers ». Cette prétention ne tient toutefois pas compte du fait que la décision *Air Canada* est largement reconnue comme faisant autorité et appuyant la proposition selon laquelle la réciprocité n’est pas rompue par une ordonnance initiale rendue en vertu de la *LACC*, de sorte que la compensation pré-post est possible mais assujettie au pouvoir du juge surveillant d’en suspendre l’exécution (voir R. Thornton, « Air Canada and Stelco : Legal Developments and Practical Lessons », dans J.

(6th) 147 (“*Tungsten No. 3*”), at para. 15). For example, Robert Thornton writes:

Air Canada was indebted to certain parties as at the date of the Initial Order. Subsequent to the date of the Initial Order, those parties became indebted to Air Canada. They wished to set-off their post-CCAA debts against Air Canada’s pre-CCAA debts owing to them. . . .

...

. . . Farley J. held that there was no loss of mutuality upon the commencement of a CCAA proceeding. Accordingly, legal set-off is available both in respect of debts existing as at the date of an initial order and in respect of debts that arose after the date of an initial order. Farley J. was correct in so doing.

...

It now appears to be clear in Canada that legal and equitable set-off are unaffected by proceedings commenced under the CCAA other than (i) the right to exercise them may be “temporally” stayed and (ii) if the CCAA applicant refuses to acknowledge the set-off, it would be necessary for the creditor to seek judicial intervention.

It is the authors’ view that it is appropriate for set-off rights to continue after the commencement of a CCAA proceeding. The CCAA applicant continues to carry on business in the ordinary course. [Emphasis added; pp. 94-96.]

[129] In *Tungsten*, the British Columbia Court of Appeal also considered set-off under s. 21 of the CCAA — first in an application for leave to appeal two orders of the British Columbia Supreme Court (*Tungsten No. 1*, per Savage J.A.) and then in an appeal from that decision denying leave to appeal (*Tungsten No. 2*). The insolvent company had obtained an initial order under the CCAA effective June 9, 2015, at which time it owed approximately \$4.4 million to Global Tungsten and Powders Corp. (“GTP”) under a loan agreement. It subsequently continued selling tungsten to GTP, which gave notice

P. Sarra, dir., *Annual Review of Insolvency Law 2006* (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (« *Tungsten n° 3* »), par. 15). Par exemple, Robert Thornton écrit :

[TRADUCTION] Air Canada était endettée envers certaines parties à la date de l’Ordonnance initiale. Après cette date, ces parties sont devenues débitrices d’Air Canada. Elles souhaitaient opérer compensation entre leurs dettes post-LACC envers Air Canada et les dettes pré-LACC de cette dernière envers elles. . . .

...

. . . Le juge Farley a conclu qu’il n’y a pas perte de mutualité dès l’introduction de procédures en vertu de la LACC. Par conséquent, la compensation légale est possible tant à l’égard de créances existant à la date d’une ordonnance initiale qu’à l’égard de créances nées après cette date. Le juge Farley était fondé à conclure ainsi.

...

Il semble maintenant clair au Canada que l’introduction de procédures en vertu de la LACC n’a pas d’incidence sur la compensation légale et sur la compensation en equity, sous réserve (i) du fait que le droit de les appliquer peut être « temporairement » suspendu et (ii) du fait que si la partie qui invoque la LACC refuse d’acquiescer à la compensation, il sera nécessaire de solliciter l’intervention des tribunaux.

Les auteurs sont d’avis qu’il est approprié que les droits d’opérer compensation continuent de s’appliquer après l’introduction de procédures en vertu de la LACC. La partie qui invoque cette loi continue d’exploiter son entreprise comme à l’habitude. [Je souligne; p. 94-96.]

[129] Dans l’affaire *Tungsten*, la Cour d’appel de la Colombie-Britannique s’est également penchée sur la compensation prévue par l’art. 21 de la LACC, d’abord dans le cadre d’une demande de permission d’appeler de deux ordonnances de la Cour suprême de la Colombie-Britannique (*Tungsten n° 1*, le juge Savage), puis en appel de cette décision refusant la permission d’appeler (*Tungsten n° 2*). L’entreprise insolvable avait obtenu, en vertu de la LACC, une ordonnance initiale prenant effet à compter du 9 juin 2015, date à laquelle elle devait approximativement 4,4 millions de dollars à Global Tungsten and

that it wished to set off its claim (the pre-order debt) against the amounts due or accruing due for the tungsten sold to it (the post-order debt) (*Tungsten No. 1*, at paras. 2 and 6). The chambers judge had held that GTP had a valid right of set-off (*Tungsten No. 2*, at para. 7).

[130] In these two decisions, the main question before the Court of Appeal was whether the chambers judge had erred in concluding that the right to effect set-off could be stayed, like the other creditors' remedies, once the initial order had been made. The question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted under the CCAA. Relying on s. 21 of the CCAA as well as on s. 11 of that statute, which confers a broad discretion on a supervising judge, the Court of Appeal explained that nothing in the words of s. 21 prohibits a supervising judge from making the right of set-off subject to a stay of remedies (*Tungsten No. 1*, at paras. 12-13 and 16; *Tungsten No. 2*, at paras. 31 and 34-35).

[131] Contrary to what my colleagues say at para. 79, in that case both the chambers judge and the Court of Appeal considered the arguments relating to the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, but they did so from the perspective of a stay of the right to effect set-off rather than by questioning the very possibility of pre-post set-off. This shows that my colleagues' concerns about the disruptive potential of pre-post set-off were given adequate consideration by the supervising judge in exercising his discretion to permit or to stay set-off.

[132] In particular, the chambers judge wrote the following: "... a temporal stay of rights can be

Powders Corp. (« GTP ») aux termes d'un contrat de prêt. Par la suite, l'entreprise insolvable continuait de vendre du tungstène à GTP, laquelle a envoyé un avis indiquant qu'elle souhaitait opérer compensation entre sa créance (soit la dette pré-ordonnance) et les sommes échues ou à échoir pour la vente de tungstène (soit la dette post-ordonnance) (*Tungsten n° 1*, par. 2 et 6). Le juge de première instance avait reconnu que GTP possédait un droit valide d'opérer compensation (*Tungsten n° 2*, par. 7).

[130] Dans ces deux décisions, la principale question dont la Cour d'appel était saisie consistait à déterminer si le juge de première instance avait fait erreur en concluant que le droit d'opérer compensation pouvait être suspendu, au même titre que les recours des autres créanciers, à partir de la délivrance de l'ordonnance initiale. La question de savoir si compensation pré-post pouvait être opérée n'a jamais été soulevée par les parties, ce qui démontrait implicitement que cette compensation était permise sous le régime de la LACC. S'appuyant sur l'art. 21 de la LACC ainsi que sur l'art. 11 de celle-ci, qui confère un large pouvoir discrétionnaire au juge surveillant, la Cour d'appel a expliqué que rien dans le texte de l'art. 21 n'interdit au juge surveillant d'assujettir le droit d'opérer compensation à la suspension des recours (*Tungsten n° 1*, par. 12-13 et 16; *Tungsten n° 2*, par. 31 et 34-35).

[131] Contrairement à ce qu'avancent mes collègues au par. 79, dans cette affaire, tant le tribunal de première instance que la Cour d'appel ont considéré les arguments relatifs aux incidences de la compensation pré-post sur la période de statu quo et sur les objectifs sous-jacents de cette dernière, mais dans l'optique de la suspension du droit d'opérer compensation plutôt qu'en s'interrogeant sur la possibilité même de la compensation pré-post. Cela démontre que les inquiétudes de mes collègues quant au potentiel perturbateur de la compensation pré-post sont adéquatement prises en compte par le juge surveillant dans l'exercice de son pouvoir discrétionnaire d'autoriser la compensation ou d'en suspendre l'application.

[132] Le juge de première instance a notamment écrit ce qui suit : [TRADUCTION] « ... une suspension

granted to further the purpose of the initial order and the purposes of the *Act*” (*Tungsten No. 3*, at para. 25). While conceding that there was some merit to the arguments on the effects of pre-post set-off, he was not prepared to reverse the decision in *Air Canada* (paras. 17-18). Moreover, he stayed the right to effect set-off on the basis that, “[i]n order to preserve the status quo to effect a restructuring, a stay of the set-off is, and was, absolutely essential”, and he added, among other things, that if the stay of set-off were not continued, the restructuring efforts “would be thrown into disarray” and “[t]he status quo would be significantly altered and the restructuring would effectively be at an end” (para. 32). The judge who considered the application for leave to appeal noted in turn that, “[c]learly, if an attempt at compromise or arrangement is to have any prospect of success there must be a means of holding creditors at bay” (*Tungsten No. 1*, at para. 16). He added that not staying the right to effect set-off would favour GTP to the detriment of the other creditors (paras. 18 and 25). Groberman J.A., who wrote the judgment of the Court of Appeal, stressed the principle that a creditor should not be able to exercise a right of set-off to circumvent a compromise or arrangement under the CCAA (*Tungsten No. 2*, at paras. 37-39).

[133] Despite my colleagues’ protestations to the contrary, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the CCAA, subject to a supervising judge’s discretion to stay such set-off having regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the CCAA.

[134] It must be concluded that the approach proposed by the Quebec Court of Appeal in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the CCAA by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. This asymmetry is contrary to

temporaire des droits peut être accordée pour appuyer l’application de l’ordonnance initiale et la réalisation des objectifs de la *Loi* » (*Tungsten n° 3*, par. 25). Il a reconnu que les arguments relatifs aux incidences de la compensation pré-post ont du mérite, mais il n’était pas prêt à renverser la décision *Air Canada* (par. 17-18). Il a en outre suspendu le droit d’opérer compensation parce que, [TRADUCTION] « [a]fin de préserver le statu quo en vue d’effectuer la restructuration, la suspension du droit d’opérer compensation est, et était, absolument essentielle », ajoutant entre autres que, si la suspension de la compensation n’était pas reconduite, les efforts de restructuration « seraient désorganisés » et « [l]e statu quo serait considérablement affecté et cela mettrait effectivement un terme à la restructuration » (par. 32). Le juge saisi de la demande d’autorisation d’appel a quant à lui souligné que, [TRADUCTION] « [d]e toute évidence, pour qu’une tentative de transaction ou d’arrangement ait quelque chance de succès, il faut un moyen de tenir les créanciers à distance » (*Tungsten n° 1*, par. 16). Il a ajouté que l’absence de suspension du droit d’opérer compensation aurait pour effet de favoriser GTP au détriment des autres créanciers (par. 18 et 25). Rédigeant l’arrêt de la Cour d’appel, le juge Groberman a insisté sur le principe selon lequel un créancier ne devrait pas pouvoir se prévaloir du droit d’opérer compensation afin de contourner une transaction ou un arrangement fondé sur la LACC (*Tungsten n° 2*, par. 37-39).

[133] Malgré les protestations à l’effet contraire de mes collègues, l’état du droit ailleurs au Canada est clair : la compensation pré-post est possible sous le régime de la LACC, sous réserve du pouvoir discrétionnaire du juge surveillant d’en suspendre l’application pour tenir compte des incidences de la compensation pré-post sur la période de statu quo et de ses objectifs sous-jacents, du bon déroulement des efforts déployés pour réaliser un arrangement et des objectifs réparateurs de la LACC.

[134] Force est de constater que l’approche avancée par la Cour d’appel du Québec dans l’arrêt *Kitco* crée une asymétrie entre l’interprétation de l’art. 21 de la LACC par les tribunaux du Québec et par les tribunaux d’autres provinces canadiennes. Cette asymétrie va à l’encontre du principe de l’interprétation

the principle of homogenous interpretation of federal statutes (Morin and Michaud, at p. 344).

C. Restructuring an Insolvent Company Versus Liquidating Its Assets

[135] Finally, in *Kitco*, Vézina J.A. noted that his conclusions were based on the fact that the insolvent company was engaged in a genuine restructuring process and that staying its creditors' remedies was crucial to bringing this process to a successful conclusion. He stressed that Kitco's restructuring plan was in jeopardy because the Agency was effecting compensation with the amounts it was supposed to pay Kitco. Kitco was required to carry on its activities while paying 15 percent in taxes on its gold inputs without receiving the refund to which it was entitled in this regard. It was thus in an [TRANSLATION] "untenable" position relative to competitors in its field (paras. 47-48).

[136] Staying the remedies of an insolvent company's creditors under the CCAA to allow the company to develop a plan of arrangement is of critical importance, particularly where the exercise of a creditor's right to effect pre-post compensation might sabotage the company's efforts to regain financial health.

[137] In this case, however, and in the opinion of the monitor and the interveners themselves, there has never been any question of SM Group proposing a plan of arrangement. Once SM Group's principal creditors filed an application for an initial order under the CCAA, it was clear that they wished to opt for a liquidation process — that is, the sale of the insolvent company to a new buyer. In this particular situation, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to

uniforme des lois fédérales (Morin et Michaud, p. 344).

C. La restructuration d'une entreprise insolvable versus la liquidation des actifs de cette entreprise

[135] Enfin, dans l'arrêt *Kitco*, le juge Vézina a souligné que ses conclusions étaient fondées sur le fait que l'entreprise insolvable était engagée dans un véritable processus de restructuration et que la suspension des recours de ses créanciers était essentielle pour lui permettre de mener à bien ce processus. Il a insisté sur le fait que le plan de restructuration de Kitco était mis en péril parce que l'Agence opérait compensation sur les sommes qu'elle devait verser à Kitco. En effet, Kitco était obligée de poursuivre ses activités tout en payant des taxes de l'ordre de 15 p. 100 sur ses intrants d'or sans recevoir le remboursement auquel elle avait droit à cet égard. Elle se trouvait ainsi dans une position « insoutenable » comparativement aux entreprises concurrentes dans son domaine (par. 47-48).

[136] La suspension, en vertu de la LACC, des recours des créanciers d'une entreprise insolvable afin de permettre à celle-ci d'élaborer un plan d'arrangement revêt une importance cruciale, en particulier lorsque l'exercice du droit d'un créancier d'opérer compensation pré-post risque de saboter les efforts déployés par l'entreprise pour retrouver sa santé financière.

[137] En l'espèce, toutefois, et de l'avis même du contrôleur et des intervenants, il n'a jamais été question pour Groupe SM de proposer un plan d'arrangement. Dès le dépôt d'une demande d'ordonnance initiale en vertu de la LACC par les principaux créanciers de Groupe SM, il était clair que ces derniers souhaitaient opter pour un processus de liquidation, soit la vente de l'entreprise insolvable à un nouvel acquéreur. Dans ce cas particulier, alors qu'un plan d'arrangement n'est pas envisageable et que l'entreprise insolvable sera de toute manière liquidée ou vendue, conclure que la compensation pré-post n'est jamais permise pourrait être injuste pour les créanciers de cette entreprise ayant une créance certaine, liquide et exigible. En effet, dans ces cas, les recours

effect pre-post compensation, since the insolvent company will become an “empty shell” after the sale. Moreover, because a plan of arrangement cannot be contemplated, allowing pre-post compensation will not have the effect of derailing the company’s restructuring process, as there is no such process.

II. Discretion Not Exercised by the Supervising Judge in This Case

[138] In my view, pre-post compensation is permitted under s. 21 of the *CCAA*, but it must be subject to the exercise of a supervising judge’s discretion. In *Callidus*, this Court clarified the framework for the exercise of this discretion under s. 11 of the *CCAA*. The first two criteria are found in s. 11, which provides that a supervising judge may make any order that is “appropriate” in the circumstances of the case and consistent with the restrictions set out in the *CCAA*. The Court added that the exercise of the discretion must also further the remedial objectives of the *CCAA* and be focused in particular on the criteria of appropriateness, good faith and due diligence (para. 70).

[139] My colleagues make a series of arguments against compensation in general and pre-post compensation in particular: the high disruptive potential of compensation; respect for the status quo period; the loss of incentive for the debtor to provide goods and services during the stay period because it would fear not being paid for them, which would deprive it of the funds needed to continue operating; the fact that an interim lender would most likely refuse to continue to finance the debtor’s operations if the loaned funds were destined to enrich another creditor; the fact that the rampart set up by a stay to protect against attacks by creditors would crumble; the fact that compensation deviates from the principle of equality among ordinary creditors and that pre-post compensation amounts to giving certain creditors an additional “type of security interest” in respect of new assets acquired by the debtor after

des créanciers seront suspendus indéfiniment et ils ne pourront jamais exercer compensation pré-post, l’entreprise insolvable étant devenue après la vente une « coquille vide ». Par ailleurs, puisqu’un plan d’arrangement n’est pas envisageable, permettre la compensation pré-post n’aura pas comme effet de faire dérailler le processus de restructuration de l’entreprise, ce processus étant inexistant.

II. L’absence d’exercice du pouvoir discrétionnaire par la juge surveillante en l’espèce

[138] À mon avis, la compensation pré-post est permise en vertu de l’art. 21 de la *LACC*, mais elle doit être assujettie à l’exercice du pouvoir discrétionnaire du juge surveillant. La Cour a précisé, dans l’arrêt *Callidus*, les balises encadrant l’exercice de ce pouvoir discrétionnaire en vertu de l’art. 11 de la *LACC*. Les deux premiers critères sont énoncés à l’art. 11, qui précise que le juge surveillant peut rendre toute ordonnance qui est « indiquée » dans les circonstances de l’affaire et qui n’est pas contraire aux restrictions prévues par la *LACC*. De plus, la Cour a ajouté que l’exercice du pouvoir discrétionnaire doit permettre la réalisation des objets réparateurs de la *LACC* en s’attachant plus particulièrement aux critères de l’opportunité, de la bonne foi et de la diligence (par. 70).

[139] Mes collègues avancent une série d’arguments à l’encontre de la compensation en général et de la compensation pré-post en particulier : le fort potentiel perturbateur d’une compensation; le respect de la période de statu quo; la perte d’incitatifs pour la débitrice de fournir des biens et services durant la période de suspension, de crainte de ne pas être payée en retour, ce qui aurait pour effet de la priver des fonds nécessaires pour poursuivre ses opérations; le fait que le prêteur intérimaire refuserait fort probablement de continuer à financer les opérations de la débitrice si les sommes prêtées sont destinées à enrichir un autre créancier; le fait que le rempart érigé par la suspension contre les attaques des créanciers s’effriterait; le fait que la compensation déroge au principe de l’égalité entre les créanciers ordinaires et le fait que la compensation pré-post équivaut à attribuer à certains créanciers une « sorte

the commencement of proceedings; etc. (paras. 59, 61 and 73).

[140] Most of these arguments presuppose that pre-post compensation will be systematically allowed without regard for the circumstances of each case and without considering whether it is “appropriate” — hence my colleagues’ position that pre-post compensation should never be authorized unless there are exceptional circumstances. Although these arguments are legitimate, they must be left to the supervising judge, who will weigh them — along with the other relevant considerations and circumstances — in exercising the discretion to permit or to deny pre-post compensation in a particular case, having regard to the remedial objectives of the CCAA.

[141] Believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, the supervising judge in this case did not exercise her discretion under s. 11 of the CCAA. Given that this discretion was not exercised by the supervising judge, it is not for this Court to exercise it to determine whether to permit compensation between the amounts owed by the City to SM Group and the claim held by the City against SM Group. The Court has made it clear that supervising judges are in the best position to decide whether to exercise their discretion in a particular case based on “a circumstance-specific inquiry that must balance the various objectives of the CCAA” (*Callidus*, at para. 76).

[142] My colleagues are of the view that remanding the case to the court of original jurisdiction would be unhelpful and not in the interests of justice (paras. 84 and 98). I respectfully disagree. In fact, this Court recently noted in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, [2021] 2 S.C.R. 704, that in cases involving an exercise of discretion by a court of first instance, “it is not in the interests of justice for this Court to step into [that court’s] shoes and decide these matters at first instance”, and that this

de garantie » additionnelle sur de nouveaux éléments d’actif acquis par la débitrice après l’ouverture des procédures; etc. (par. 59, 61 et 73).

[140] La plupart de ces arguments présument que la compensation pré-post sera systématiquement accordée sans égards aux circonstances propres à chaque affaire, et nonobstant la question de savoir si celle-ci est « indiquée » — d’où la position de mes collègues selon laquelle la compensation pré-post ne devrait jamais être autorisée, sauf circonstances exceptionnelles. Bien que légitimes, ces arguments doivent être laissés à l’appréciation du juge surveillant qui, dans l’exercice de son pouvoir discrétionnaire d’accorder ou non la compensation pré-post dans une affaire donnée, les soupèsera avec les autres considérations et circonstances pertinentes, le tout à la lumière des objectifs réparateurs de la LACC.

[141] Estimant être liée par les conclusions de la Cour d’appel du Québec dans l’arrêt *Kitco*, la juge surveillante n’a pas exercé le pouvoir discrétionnaire que lui confère l’art. 11 de la LACC. Vu l’absence d’exercice de ce pouvoir par la juge surveillante, il ne revient pas à la Cour de l’exercer afin de décider s’il y a lieu d’autoriser ou non la compensation entre les sommes dues par la Ville de Montréal à Groupe SM et la créance de cette dernière à l’encontre de Groupe SM. La Cour a précisé que les juges surveillants sont les mieux placés pour décider s’ils doivent exercer leur pouvoir discrétionnaire dans une situation donnée en s’appuyant sur « une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la LACC » (*Callidus*, par. 76).

[142] Mes collègues sont d’avis que le renvoi du dossier en première instance serait inutile et contraire aux intérêts de la justice (par. 84 et 98). Avec égards, je ne suis pas d’accord. En effet, la Cour a récemment rappelé dans l’arrêt *Société Radio-Canada c. Manitoba*, 2021 CSC 33, [2021] 2 R.C.S. 704, que dans les affaires qui reposent sur l’exercice d’un pouvoir discrétionnaire par un tribunal de première instance, « il n’est pas dans l’intérêt de la justice que notre Cour se mette à la place de [ce tribunal] et

Court's role is limited to reviewing the exercise of the discretion "through [a] deferential lens" (para. 88).

III. Conclusion

[143] For these reasons, I would allow the appeal solely for the purpose of remanding the case to the Superior Court to have it determine whether the City may effect compensation between SM Group's pre-initial order debts and the post-initial order amounts owed by the City to SM Group. I would also allow the appeal so that it can be determined whether the City may effect compensation in respect of its water meter claim.

Appeal dismissed with costs, BROWN J. dissenting.

Solicitors for the appellant: IMK, Montréal.

Solicitors for the respondent: Stikeman Elliott, Montréal.

Solicitors for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP: McCarthy Tétrault, Montréal.

Solicitors for the intervenor Thornhill Investments Inc.: Fasken Martineau DuMoulin, Montréal.

Solicitor for the intervenor Ville de Laval: Service des affaires juridiques de la Ville de Laval, Laval.

Solicitors for the intervenor Union des municipalités du Québec: Borden Ladner Gervais, Montréal.

tranche ces questions en première instance » et que le rôle de la Cour se limite à réviser l'exercice de ce pouvoir « avec un regard empreint de déférence » (par. 88).

III. Conclusion

[143] Pour ces raisons, j'accueillerais l'appel à seule fin de retourner le dossier devant la Cour supérieure afin qu'il soit décidé si la Ville peut opérer compensation entre les dettes de Groupe SM pré-ordonnance initiale et les sommes dues par la Ville à Groupe SM post-ordonnance initiale. J'accueillerais également l'appel afin qu'il soit décidé si la Ville peut opérer compensation quant à sa réclamation à l'égard des compteurs d'eau.

Pourvoi rejeté avec dépens, le juge BROWN est dissident.

Procureurs de l'appelante : IMK, Montréal.

Procureurs de l'intimée : Stikeman Elliott, Montréal.

Procureurs des intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Thornhill Investments Inc. : Fasken Martineau DuMoulin, Montréal.

Procureur de l'intervenante la Ville de Laval : Service des affaires juridiques de la Ville de Laval, Laval.

Procureurs de l'intervenante l'Union des municipalités du Québec : Borden Ladner Gervais, Montréal.

TAB 20



SUPREME COURT OF CANADA

CITATION: Poonian v. British
Columbia (Securities
Commission), 2024 SCC 28

APPEAL HEARD: December 6,
2023

JUDGMENT RENDERED: July 31,
2024

DOCKET: 40396

BETWEEN:

Thalbinder Singh Poonian and Shailu Poonian
Appellants

and

British Columbia Securities Commission
Respondent

- and -

**Attorney General of Ontario, Attorney General of British Columbia, Attorney
General of Saskatchewan, Canadian Association of Insolvency and
Restructuring Professionals, Superintendent of Bankruptcy, Federation of
Law Societies of Canada, Alberta Securities Commission, Ontario Securities
Commission and Osgoode Investor Protection Clinic**
Intervenors

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and
O'Bonsawin JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 116)

Côté J. (Wagner C.J. and Rowe, Jamal and O'Bonsawin JJ.
concurring)

**REASONS
DISSENTING IN
PART:**
(paras. 117 to 142)

Karakatsanis J. (Martin J. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

**Thalbinder Singh Poonian and
Shailu Poonian**

Appellants

v.

British Columbia Securities Commission

Respondent

and

**Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Association of Insolvency
and Restructuring Professionals,
Superintendent of Bankruptcy,
Federation of Law Societies of Canada,
Alberta Securities Commission,
Ontario Securities Commission and
Osgoode Investor Protection Clinic**

Intervenors

Indexed as: Poonian v. British Columbia (Securities Commission)

2024 SCC 28

File No.: 40396.

2023: December 6; 2024: July 31.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and
O’Bonsawin JJ.

Bankruptcy and insolvency — Debts not released by order of discharge — Provincial securities commission imposing administrative penalties and disgorgement orders on bankrupts for breach of securities legislation — Commission applying to prevent release of debts by order of discharge on basis of exceptions set out in federal bankruptcy legislation — Whether commission's administrative penalties and disgorgement orders fall within exceptions provided for in bankruptcy legislation such that they are not released by order of discharge and therefore survive bankruptcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178(1)(a), (e).

Between 2007 and 2009, the bankrupts engaged in market manipulation that caused vulnerable investors to lose millions of dollars. The British Columbia Securities Commission found that the bankrupts had contravened the province's *Securities Act*. It ordered the bankrupts to pay \$13.5 million in administrative penalties; it also ordered them to disgorge approximately \$5.6 million, which represented the amounts they obtained as a result of the market manipulation scheme. These sanctions were registered with the Supreme Court of British Columbia pursuant to the *Securities Act*, which provides that, on being filed in a registry of that court, a decision of the Commission has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of that court.

Section 178(1) of the *Bankruptcy and Insolvency Act* sets out a specific list of debts that are not released by an order of discharge and that therefore survive

bankruptcy. Relying on some of these exceptions, the Commission applied for a declaration that the amounts owed to it by the bankrupts, who remain undischarged, not be released by any order of discharge. The chambers judge allowed the application, finding that the exceptions in s. 178(1)(a) — “any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail” — and in s. 178(1)(e) — “any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation” — both applied and that the bankrupts’ debts were exempt from and would survive any discharge. The bankrupts appealed. According to the Court of Appeal, the debts were not exempt from discharge pursuant to s. 178(1)(a) because the Commission’s decisions could not be said to have been “imposed” by a court as required by the provision. However, the court upheld the chambers judge’s conclusion that both the administrative penalties and the disgorgement orders were exempt under s. 178(1)(e). Given that the debts were still exempt, the appeal was dismissed.

Held (Karakatsanis and Martin JJ. dissenting in part): The appeal should be allowed in part.

Per Wagner C.J. and **Côté**, Rowe, Jamal and O’Bonsawin JJ.: Neither the administrative penalties nor the disgorgement orders are exempt from discharge pursuant to s. 178(1)(a). The words “imposed by a court” in s. 178(1)(a) do not capture orders made by administrative tribunals or regulatory agencies, such as the

Commission, that are subsequently registered as judgments of a court. In addition, the administrative penalties do not come within the exception in s. 178(1)(e), as they did not result directly from the fraudulent scheme; rather, they arose indirectly as a result of the Commission's decision to sanction the bankrupts. The disgorgement orders, however, are captured by the s. 178(1)(e) exception because there is a direct link between them and the bankrupts' fraudulent conduct. Therefore, they will not be released by any possible future order of discharge.

For a debt to survive bankruptcy under s. 178(1)(a), the creditor must establish that the debt is (1) a fine, penalty, restitution order or other order similar in nature, (2) imposed by a court, and (3) imposed in respect of an offence. This provision is not restricted to penalties associated with criminal or quasi-criminal proceedings. However, the word "court" does not capture administrative tribunals or regulatory bodies. If Parliament had wanted fines, penalties, restitution orders or other orders similar in nature imposed by regulatory bodies, administrative tribunals or other administrative decision makers to be exempt from discharge under this section, it could have said so expressly. Moreover, this provision cannot be read so broadly as to include fines imposed by tribunals that are registered in a court. The registration of a decision with a court does not change the fact that it was made and imposed by an administrative decision maker, nor does it overcome the requirement that the exempt debt be imposed by a court. When a decision is registered with a court, the court's involvement is passive, whereas the act of "imposing" a fine, penalty, restitution order or other order similar in nature requires that the court be actively involved in making the decision. In

the instant case, the administrative penalties and disgorgement orders were imposed by the Commission, not by a court, and therefore are not captured by s. 178(1)(a).

For a debt or liability to survive bankruptcy under s. 178(1)(e), the creditor must establish three elements: (1) false pretences or fraudulent misrepresentation; (2) a passing of property or provision of services; and (3) a link between the debt or liability and the fraud. To establish the first requirement, the onus is on the creditor to prove that the debts or liabilities were obtained as a result of the debtor's false pretences or fraudulent misrepresentation. A court cannot take judicial notice of fraud, nor can it infer fraud in a cursory manner. When a party relies on the findings and conclusions of an administrative decision maker to establish that the debtor made a fraudulent statement, the court must still make its own determination based on a review of the record, even where the administrative findings of fraud are express. The evidence tendered to prove fraud or dishonesty must be clear and cogent and courts must be consistent and rigorous in assessing the evidence presented to them in this regard. Even where all of the required findings for false pretences or fraudulent misrepresentation have been expressly made by an administrative decision maker, a determination of whether the claim falls within one of the categories of non dischargeable claims must be made by a court.

To establish the second requirement, there must be a loss in the form of a transfer of property or delivery of services, as well as a debt or liability corresponding to that loss. Section 178(1)(e) does not require that the bankrupt be the recipient of the

property of which a person was deprived. The property need not have been obtained, or retained, by the bankrupt and may have passed directly or indirectly from the person to a third party at the bankrupt's direction or on his or her behalf. What is required is that the fraudulent misrepresentation induced a person to give the property to the bankrupt or someone associated with the bankrupt.

To establish the third requirement, the debt or liability must have been created as a result of false pretences or fraudulent misrepresentation. This requires a direct link whereby only the debt or liability that represents the value of the property or services obtained by false pretences or fraudulent misrepresentation qualifies as non dischargeable. While in most cases, the claiming creditor will be the party directly victimized by the false pretences or fraudulent misrepresentation, the wording of s. 178(1)(e) does not import a direct victim requirement. A creditor who is not a direct victim is thus not barred from bringing a claim under this section provided that the claim is the result of a person being deprived of property or services after having detrimentally relied on the debtor's false pretences or fraudulent misrepresentation.

In the instant case, the first s. 178(1)(e) requirement is met. The market manipulation was characterized as fraudulent by both the Commission and the chambers judge, because the bankrupts falsely and knowingly misrepresented the price of shares in order to turn a profit. The second requirement is also met, as the bankrupts obtained property or services as a result of their fraudulent misrepresentation. While some of the amounts obtained as a result of the market manipulation scheme were

obtained indirectly, it is not necessary that the bankrupt directly obtain or retain the property for the s. 178(1)(e) exception to apply. The property may pass from a person or group of people (the deceived investors) to a third party (another participant) at the direction of the bankrupt.

With respect to the third requirement, it is not met in the case of the administrative penalties, which therefore do not survive a discharge from bankruptcy under s. 178(1)(e). A direct link between the debt or liability and the fraudulent conduct is required and it is only the value of the property or services obtained as a result of that conduct that is not released by an order of discharge. The debt represented by the Commission's administrative penalties did not result directly from the bankrupts' fraudulent misrepresentation, but arose indirectly as a result of the Commission's decision to sanction them for having obtained property through deceitful statements to investors. If the exempt debt or liability is not restricted to the value of the property or services obtained by false pretences or fraudulent misrepresentation, then s. 178(1)(e) has the potential to capture debts or liabilities that are not the direct result of deceit.

However, the Commission's disgorgement orders are captured by the s. 178(1)(e) exception and will not be released by any order of discharge. Where a person has not complied with a provision of the *Securities Act*, the Commission may order that person to pay to it any amount obtained as a result of the failure to comply. The disgorgement orders were made under the *Securities Act* and represent the value of the bankrupts' fraud — the funds that they gained as a result of their market

manipulation. There is therefore a direct link between the fraudulent conduct of the bankrupts and the Commission's disgorgement orders.

Per Karakatsanis and Martin JJ. (dissenting in part): The appeal should be dismissed. Although there is agreement with the majority that the administrative penalties and the disgorgement orders imposed by the Commission do not survive bankruptcy under s. 178(1)(a), both the disgorgement orders and the administrative penalties properly fall within the narrow scope of s. 178(1)(e) and should not be released by any order of discharge. They are both debts that originate from the bankrupts having obtained property by false pretences or fraudulent misrepresentations. Both are monetary sanctions imposed because of, and thus resulting from, deceitful conduct that Parliament specifically sought to address.

There is disagreement with the majority regarding the scope of the causation requirement contemplated by the words "resulting from" in s. 178(1)(e) and the degree of link required between the debt and the deceitful behaviour. Just as s. 178(1)(e) does not require that there be an exact correlation between the person claiming the exemption and the victims of that deceitful conduct, it does not require that the quantum of the debt or liability be limited by the quantum of the property obtained as a result of that deceitful conduct. Such a requirement is unsupported by the jurisprudence, is not found in the text of the provision, and is inconsistent with the provision's central focus. The central focus is the deceitful conduct at the source of the debt or liability, not the exact gain derived thereby.

A direct causation requirement does not mean that the debt or liability must be limited to the value of the property obtained; rather it means that where only part of a liability can be traced to deceitful conduct, but not the balance, only the part induced by fraudulent conduct will be exempt from discharge. Where a debt or liability is entirely caused by fraudulent conduct, such as punitive damages imposed to sanction the conduct, there is no reason to limit the application of s. 178(1)(e) only to the gain ultimately obtained by the bankrupt. The jurisprudence in fact overwhelmingly shows that punitive damages exceeding the value of the property obtained qualify for the exception as long as they directly result from the deceitful conduct targeted by s. 178(1)(e).

In the instant case, the amounts the Commission submits should survive discharge have as their only source or origin the bankrupts' deceitful conduct. Both the disgorgement orders and the administrative penalties under the *Securities Act* are monetary sanctions for the unlawful conduct. Like punitive damages imposed at private law, the administrative penalties arise directly from the type of conduct that they sanction. To exclude administrative penalties on the basis that they have an element of general deterrence amounts to reading in an additional limitation that is found nowhere in the text of the provision, and is inconsistent with the purpose of the exception.

Parliament has determined that some bankrupts simply do not deserve to be free of particular debts, based on the nature of the conduct giving rise to those debts. It provided for many exceptions to the fresh start principle, in s. 178(1), that are focused

not on the person claiming the exemption but on categories of specific wrongful conduct that give rise to debts that are not released. Section 178(1)(e) should ultimately be interpreted purposively so as to ensure that dishonest debtors do not benefit from their dishonesty. This purpose would surely extend to a decision of a securities commission, charged with enforcing securities laws in order to protect the interests of the public and promoting the integrity of the capital markets.

Cases Cited

By Côté J.

Applied: *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53;
considered: *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, 8 Alta. L.R. (7th) 177, rev'd 2021 ABCA 411, 34 Alta. L.R. (7th) 219; *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 255 Man. R. (2d) 45; *Woolf v. Harrop* (2003), 50 C.B.R. (4th) 309; *Goldstein, Re*, 2011 ONSC 561, 74 C.B.R. (5th) 296;
referred to: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Shakell, Re* (1988), 70 C.B.R. (N.S.) 270; *Phenix, Re* (1989), 76 C.B.R. (N.S.) 82; *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197; *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2015 ONCA 465, 126 O.R. (3d) 81; *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 925, 160 O.R. (3d) 205; *Martin v. Martin*, 2005 NBCA 32, 282 N.B.R. (2d) 61; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710; *Air Canada, Re* (2006), 28 C.B.R. (5th)

317; *Chaytor, Re*, 2006 BCSC 1742, 26 C.B.R. (5th) 574; *Belair v. Gottschlich*, 2008 ABQB 47, 89 Alta. L.R. (4th) 268; *R. v. Manziros*, 2004 MBQB 121, 183 Man. R. (2d) 279; *Chambre des notaires du Québec v. Dugas*, [2003] R.J.Q. 1; *Simone v. Daley* (1999), 43 O.R. (3d) 511; *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.* (1999), 123 O.A.C. 288; *Vancouver (City) v. Alliston*, 2003 BCPC 105, 47 C.B.R. (4th) 142; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *J.R.B. v. Jimenez*, 2018 ABQB 847; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555; *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143; *Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82; *Bryant v. Benjamin*, 2023 QCCA 1021; *H.Y. Louie Co. v. Bowick*, 2015 BCCA 256, 386 D.L.R. (4th) 117; 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261; *Iroquois Falls Community Credit Union Ltd. (Liquidator of) v. Miljours* (2009), 52 C.B.R. (5th) 231; *Derry v. Peek* (1889), 14 App. Cas. 337; *Morris Bureau v. Darde*, 2013 NSCA 121, 335 N.S.R. (2d) 378; *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109, aff'd 2016 ONCA 875; *Canada (Attorney General) v. Bourassa (Trustee of)*, 2002 ABCA 205, 6 Alta. L.R. (4th) 223; *Lawyers' Professional Indemnity Co. v. Rodriguez*, 2018 ONCA 171, 139 O.R. (3d) 641; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164; *Sharma v. Sandhu*, 2019 MBQB

160; *McAteer v. Billes*, 2006 ABCA 312, 397 A.R. 365; *Morgan v. Demers* (1986), 71 A.R. 244; *Varvis (Bankrupt), Re*, 1999 ABQB 853, 254 A.R. 197; *Molloy v. Janes & Noseworthy Ltd.* (1998), 164 Nfld. & P.E.I.R. 176; *The Workers' Compensation Board v. Petkau*, 2018 SKCA 85, 429 D.L.R. (4th) 92; *Pietrzak, Re* (2016), 39 C.B.R. (6th) 145; *Groupe Unigesco inc. v. Michaud*, 2021 QCCQ 10330; *Dead End Survival, LLC v. Marhasin*, 2020 ONSC 766, 77 C.B.R. (6th) 299.

By Karakatsanis J. (dissenting in part)

Varvis (Bankrupt), Re, 1999 ABQB 853, 254 A.R. 197; *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 925, 160 O.R. (3d) 205; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710; *The Workers' Compensation Board v. Petkau*, 2018 SKCA 85, 429 D.L.R. (4th) 92; *Pietrzak, Re* (2016), 39 C.B.R. (6th) 145; *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143; *Groupe Unigesco inc. v. Michaud*, 2021 QCCQ 10330; *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109; *Dead End Survival, LLC v. Marhasin*, 2020 ONSC 766, 77 C.B.R. (6th) 299; *Grewal v. Brar*, 2015 MBQB 3, 313 Man. R. (2d) 94; *Bank of Montreal v. 1886758 Ontario Inc.*, 2022 ONSC 4642, 1 C.B.R. (7th) 213; *A.J. Lanza Fruits & Vegetables Ltd. v. United Farmers*, 2024 ONSC 1780, 12 C.B.R. (7th) 371; *Celanese Canada Inc. v. Murray Demolition Corp.*, 2010 CanLII 29089; *Horth v. Lalonde-Rousseau*, 2021 QCCQ 3668; *Maison des jeunes de Contrecoeur v. Bourdon*, 2011 QCCQ 3476; *Vivacqua v. Contino*, 2009 CanLII 14574; *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R.

(5th) 301; *Copper Cliff Community Credit Union Ltd. v. Parker* (1977), 18 O.R. (2d) 49; *Goldstein, Re*, 2011 ONSC 561, 74 C.B.R. (5th) 296; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197; *Simone v. Daley* (1999), 43 O.R. (3d) 511; *Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82; *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 255 Man. R. (2d) 45; *McAteer v. Billes*, 2006 ABCA 312, 397 A.R. 365; *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, 8 Alta. L.R. (7th) 177, rev'd 2021 ABCA 411, 34 Alta. L.R. (7th) 219.

Statutes and Regulations Cited

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 64(1).

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 “court”, 69.6, 172, 173, 178(1), (2), 183(1), (1.1).

Criminal Code, R.S.C. 1985, c. C-46, s. 361(1).

Securities Act, R.S.B.C. 1996, c. 418, ss. 15, 15.1, 57(1)(a) [rep. & sub. 2019, c. 38, s. 25], 161(1)(g), 162(1), 163.

Securities Regulation, B.C. Reg. 196/97.

Authors Cited

Bennett, Frank. *Bennett on Bankruptcy*, 26th ed. Toronto: LexisNexis, 2024.

- Black's Law Dictionary*, 11th ed., by Bryan A. Garner. St. Paul, Minn.: Thomson Reuters, 2019, "administrative tribunal", "court", "regulatory agency".
- Brochu, Denis. *Précis de la faillite et de l'insolvabilité*, 6th ed. Montréal: LexisNexis, 2022.
- Durnford, Ben. "Recent Developments under Section 178(1)(a) and (e) of the *Bankruptcy and Insolvency Act*: A Case Study of *Poonian v. British Columbia (Securities Commission)*" (2023), 12 *J.I.I.C.* 107.
- Girgis, Jassmine, and Thomas G. W. Telfer, "Do Securities Commission Debts Survive a Bankruptcy Discharge? An Analysis of *Poonian v. British Columbia (Securities Commission) (BCCA)*" (2023), 67 *Can. Bus. L.J.* 438.
- Girgis, Jassmine, and Thomas G. W. Telfer, "The Fraudulent Misrepresentation and False Pretences Exception to the Bankruptcy Discharge: Balancing the Debtor's Fresh Start with Confidence in the Credit System", in Jill Corraini and D. Blair Nixon, eds., *Annual Review of Insolvency Law 2022*. Toronto: Thomson Reuters, 2023, 143.
- Honsberger, John D., and Vern W. DaRe. *Honsberger's Bankruptcy in Canada*, 5th ed. Toronto: Thomson Reuters, 2017.
- Macaulay, Robert W., and James L. H. Sprague. *Practice and Procedure Before Administrative Tribunals*, by Lorne Sossin. Toronto: Carswell, 2004 (loose-leaf updated July 2024, release 7).
- Murray, Haddon, and Heather Fisher. "You're Hot and You're Cold, You're Yes and You're No: Conflicting Appellate Decisions Regarding Whether Regulators' Fines, Penalties or Restitution Orders Survive Bankruptcy", in Jill Corraini and D. Blair Nixon, eds., *Annual Review of Insolvency Law 2022*. Toronto: Thomson Reuters, 2023, 569.
- Nocilla, Alfonso. "Comment on *Shaver-Kudell Manufacturing Inc. v Knight Manufacturing Inc.*" (2022), 45:2 *Man. L.J.* 177.
- Sarra, Janis, Geoffrey B. Morawetz and L. W. Houlden. *The 2024 Annotated Bankruptcy and Insolvency Act*. Toronto: Carswell, 2024.
- Sullivan, Ruth. *The Construction of Statutes*, 7th ed. Toronto: LexisNexis, 2022.
- Swaigen, John, and Susan McRory. *Regulatory Offences In Canada: Liability and Defences*, 2nd ed. Toronto: Carswell, 2018.
- Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed. Toronto: Irwin Law, 2015.

APPEAL from a judgment of the British Columbia Court of Appeal (Harris, Willcock and Fenlon JJ.A.), 2022 BCCA 274, 65 B.C.L.R. (6th) 213, 100 C.B.R. (6th) 182, 472 D.L.R. (4th) 115, [2022] 10 W.W.R. 375, [2022] B.C.J. No. 1417 (Lexis), 2022 CarswellBC 2124 (WL), affirming a decision of Crerar J., 2021 BCSC 555, [2021] B.C.J. No. 609 (Lexis), 2021 CarswellBC 888 (WL). Appeal allowed in part, Karakatsanis and Martin JJ. dissenting in part.

Cody G. Reedman, for the appellants.

William L. Roberts, Laura L. Bevan and Sarah B. Hannigan, for the respondent.

Susan Keenan and Jake Eidinger, for the intervener the Attorney General of Ontario.

Aaron Welch and Heather Wellman, for the intervener the Attorney General of British Columbia.

Jared G. Biden, for the intervener the Attorney General of Saskatchewan.

C. Haddon Murray, Heather Fisher and James Aston, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Zoe Oxaal and *Roy Lee*, for the intervener the Superintendent of Bankruptcy.

Devin Eeg and *Claire Hunter, K.C.*, for the intervener the Federation of Law Societies of Canada.

Michael Beeforth, Raphael T. Eghan and *Brandon Barnes Trickett*, for the intervener the Alberta Securities Commission.

Erin Hoult and *Khrystina McMillan*, for the intervener the Ontario Securities Commission.

Stephen Aylward and *Karen Bernofsky*, for the intervener the Osgoode Investor Protection Clinic.

The judgment of Wagner C.J. and Côté, Rowe, Jamal and O’Bonsawin JJ. was delivered by

CÔTÉ J. —

TABLE OF CONTENTS

	Paragraph
I. <u>Introduction</u>	1
II. <u>Facts</u>	7

III. <u>Judicial History</u>	11
A. <i>Supreme Court of British Columbia, 2021 BCSC 555 (Crerar J.)</i>	11
B. <i>British Columbia Court of Appeal, 2022 BCCA 274, 65 B.C.L.R. (6th) 213 (Harris, Willcock and Fenlon JJ.A.)</i>	15
IV. <u>Issues</u>	20
V. <u>Analysis</u>	21
A. <i>General Principles Governing the Discharge of a Bankrupt</i>	21
(1) <u>Section 172: Court May Grant or Refuse Discharge</u>	23
(2) <u>Section 178(1): Debts Not Released by Order of Discharge</u>	25
(3) <u>The Poonians' Application for Discharge Was Refused Under Section 172</u>	28
B. <i>Do the Commission's Claims Fall Within the Section 178(1) Exceptions?</i>	31
(1) <u>Section 178(1)(a)</u>	31
(a) <i>Section 178(1)(a) Is Not Limited to Orders Imposed in a Criminal or Quasi-Criminal Context</i>	33
(b) <i>The Words "Imposed by a Court" Do Not Capture Orders Made by Administrative Tribunals That Are Subsequently Registered as Judgments of a Court</i>	43
(c) <i>Application of Section 178(1)(a) to the Commission's Orders</i>	51
(i) <u>The Commission's Administrative Penalties Are Not Exempt From Discharge Under Section 178(1)(a)</u>	51
(ii) <u>The Commission's Disgorgement Orders Are Not Exempt From Discharge Under Section 178(1)(a)</u>	52
(2) <u>Section 178(1)(e)</u>	53
(a) <i>False Pretences or Fraudulent Misrepresentation</i>	61
(b) <i>Passing of Property or Provision of Services</i>	70
(c) <i>Link Required Between the Debt or Liability and the Fraud</i>	74
(d) <i>There Is No "Direct Victim" Requirement</i>	83
(e) <i>Application of Section 178(1)(e) to the Commission's Orders</i>	96
(i) <u>The Commission's Administrative Penalties Did Not Result From the Fraudulent Scheme</u>	102
(ii) <u>The Commission's Disgorgement Orders Did Result From the Fraudulent Scheme</u>	108
VI. <u>Conclusion</u>	115

I. Introduction

[1] The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”), furthers two important purposes: the equitable distribution of a bankrupt’s assets among creditors and the bankrupt’s financial rehabilitation. Financial rehabilitation means that a debtor will be afforded a “fresh start” when appropriate. The fresh start principle is codified in s. 178(2) of the *BIA*; it allows a bankrupt to be released from outstanding debts at the end of the bankruptcy process. Thus, subject to reasonable conditions, the *BIA* permits an honest but unfortunate debtor to be freed from the burdens of indebtedness and to reintegrate into economic life.

[2] Financial rehabilitation operates as the general rule, such that every provable claim is presumptively swept into the bankruptcy. However, it has its limits. Through s. 178(1) of the *BIA*, Parliament has enacted specific exceptions to this general rule. An order of discharge does not release the bankrupt from a claim captured by a s. 178(1) exception. Indeed, where an exception applies, the fresh start principle yields to certain overriding policy objectives which demand that such a claim survive a discharge from bankruptcy.

[3] This appeal requires our Court to interpret two of these exceptions, codified in s. 178(1)(a) and (e) of the *BIA*. It arises in the context of the application of the *British Columbia Securities Act*, R.S.B.C. 1996, c. 418. Our Court must determine whether the administrative financial penalties and/or the disgorgement orders imposed

by the respondent, the British Columbia Securities Commission (“Commission”), survive a discharge from bankruptcy under one of these exceptions.

[4] The appellants, Thalbinder Singh Poonian and Shailu Poonian, are undischarged bankrupts. Between 2007 and 2009, the Poonians engaged in market manipulation that caused vulnerable investors to lose millions of dollars. The Commission found that the Poonians had contravened s. 57(a) (now s. 57(1)(a)) of the *Securities Act*. It ordered the payment of administrative penalties by both Mr. Poonian (\$10 million) and Ms. Poonian (\$3.5 million). The Commission also issued orders pursuant to s. 161(1)(g) of the *Securities Act* requiring Mr. Poonian to disgorge \$1,319,167 as well as \$1,126,260 jointly and severally with another participant, and requiring Ms. Poonian to disgorge \$3,149,935. The disgorgement orders represent the amounts the Poonians obtained as a result of the market manipulation scheme.

[5] Relying on the exceptions set out in s. 178(1) of the *BIA*, the Commission applied for a declaration that the amounts owed to it by the Poonians not be released by any order of discharge. The question before our Court is whether the administrative penalties and/or the disgorgement orders imposed by the Commission can be characterized as either “any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail” (s. 178(1)(a)) or “any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim”

(s. 178(1)(e)). If so, they will not be released by any order of discharge and will survive bankruptcy.

[6] For the reasons I explain below, I conclude that the administrative penalties imposed by the Commission do not fall within the exceptions set out in either s. 178(1)(a) or (e) and therefore do not survive a discharge from bankruptcy on those bases. I also conclude that the disgorgement orders imposed by the Commission do not fall within the s. 178(1)(a) exception and do not survive a discharge from bankruptcy on that basis. However, they are captured by s. 178(1)(e) and therefore will not be released by any possible future order of discharge.

II. Facts

[7] On August 29, 2014, the Commission found that the Poonians, together with a number of relatives, friends and acquaintances, had engaged in market manipulation, contrary to s. 57(a) of the *Securities Act*. The Poonians had acquired a majority position in a public oil and gas company called OSE Corp. (“OSE”) and had then increased the price of OSE’s shares by various manipulations, including trades between themselves. Using pseudonyms and multiple nominee accounts, they had artificially inflated the share price from \$0.10 to \$0.17 per share to a high of near \$2.00.

[8] The Commission found that the Poonians, and those working with them in this scheme, had sold the overpriced OSE shares to investors with the assistance of an entity called the Phoenix Group. The Poonians had paid commissions to the Phoenix

Group, which had in turn encouraged its clients, generally unsophisticated investors seeking to escape personal debt through investment in higher-yield vehicles, to purchase OSE shares at the artificially inflated prices.

[9] The Commission described the scheme as “serious misconduct” and as “elaborate, involving layers of deception to conceal the . . . participation [of the Poonians and their associates] in the manipulation” (2015 BCSECCOM 96 (“Sanctions Decision”), at para. 17 (CanLII)). The Commission ordered the payment of administrative penalties by Mr. Poonian (\$10 million) and Ms. Poonian (\$3.5 million) (para. 96). The Commission later issued orders pursuant to s. 161(1)(g) of the *Securities Act*, which are commonly referred to as disgorgement orders. Mr. Poonian was ordered to disgorge \$1,319,167 to the Commission and an additional \$1,126,260 on a joint and several basis with another participant in the scheme, and Ms. Poonian was ordered to disgorge \$3,149,935 (2018 BCSECCOM 160 (“Reassessment Decision”), at para. 85 (CanLII)). As a result, the Poonians together owe \$19,095,362 (plus interest) to the Commission. These sanctions were registered with the Supreme Court of British Columbia pursuant to s. 163 of the *Securities Act*, which provides that, on being filed in a registry of that court, a decision of the Commission has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of that court. The Poonians owe \$4,335,252.60 to their next largest creditor, the Canada Revenue Agency.

[10] On April 20, 2018, the Poonians made a voluntary assignment in bankruptcy. On February 13, 2020, they applied for discharge from bankruptcy, which the Commission and the Canada Revenue Agency opposed. The Supreme Court of British Columbia dismissed the Poonians’ application on April 8, 2020, and they remain undischarged bankrupts.

III. Judicial History

A. *Supreme Court of British Columbia, 2021 BCSC 555 (Crerar J.)*

[11] The Commission applied to the Supreme Court of British Columbia for a declaration that the debts represented by the administrative penalties and disgorgement orders not be released by any order of discharge, pursuant to s. 178(1)(a), (d) and (e) of the *BIA*. The chambers judge allowed the Commission’s application, finding that the debts were exempt from and would survive any discharge. While only one exception had to apply for the debts not to be released, the chambers judge found that the exceptions in s. 178(1)(a) and (e) both applied.

[12] With respect to s. 178(1)(a), the chambers judge rejected the Poonians’ argument that it applies only to fines, penalties or restitution orders imposed in criminal or quasi-criminal proceedings. He noted that the inclusion of the words “restitution order” in s. 178(1)(a) implies that the scope of this provision extends beyond monetary orders imposed in a criminal or quasi-criminal context. The chambers judge also rejected the Poonians’ argument that an order of the Commission that is subsequently

registered with a court is not an order “imposed by a court”, as required by s. 178(1)(a). According to the chambers judge, both the administrative penalties and the disgorgement orders could be characterized as fines, penalties, restitution orders or other orders similar in nature that had been imposed by a court in respect of an offence. On this basis, he ordered that they not be released on discharge from bankruptcy.

[13] As for s. 178(1)(e), the chambers judge agreed with the Commission that the Poonians’ market manipulation, particularly the multi-party elaborate scheme they had orchestrated, was at its core a fraudulent misrepresentation and false pretence. He held that, through that scheme, the Poonians had “obtained property” in the form of millions of dollars and that, in doing so, they had engaged in deceitful conduct, which he deemed “the essence of s 178(1)(e)” (para. 105 (CanLII)). The chambers judge concluded that the Poonians’ market manipulation and knowing exploitation of vulnerable investors, which corrodes public confidence in securities markets, were evidence of the deceit lying at the heart of s. 178(1)(e). As a result, the administrative penalties and disgorgement orders were also exempt from discharge under s. 178(1)(e).

[14] The Commission argued in the alternative that the disgorgement orders (but not the administrative penalties) should be exempt under s. 178(1)(d). However, in light of his conclusion that both the disgorgement orders and the administrative penalties were exempt under s. 178(1)(a) and (e), the chambers judge declined to consider this alternative ground. No further arguments were made in respect of s. 178(1)(d), either before the British Columbia Court of Appeal or before our Court.

B. *British Columbia Court of Appeal*, 2022 BCCA 274, 65 B.C.L.R. (6th) 213 (Harris, Willcock and Fenlon JJ.A.)

[15] The Poonians appealed to the British Columbia Court of Appeal, challenging the chambers judge's interpretation of the *BIA*. They also argued that the chambers judge had erred in adopting and following the rationale in *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, 8 Alta. L.R. (7th) 177, a decision later reversed by the Alberta Court of Appeal (2021 ABCA 411, 34 Alta. L.R. (7th) 219). Justice Willcock, writing for the British Columbia Court of Appeal, held that the chambers judge had erred in concluding that the debts were exempt from discharge pursuant to s. 178(1)(a) of the *BIA*. However, he upheld the chambers judge's conclusion that the debts were exempt under s. 178(1)(e). Given that the debts were exempt, albeit only under s. 178(1)(e), the appeal was dismissed.

[16] Justice Willcock agreed with the chambers judge that s. 178(1)(a) is not limited to monetary orders imposed in criminal or quasi-criminal proceedings. However, he disagreed that a decision of the Commission that is merely registered with the Supreme Court of British Columbia can be considered an order "imposed by a court". Once the Commission's decisions are registered with the court, they can be enforced as if they were judgments of the court, but they cannot be said to be "imposed" by the court. The Commission's penalties and disgorgement orders therefore did not fall within the s. 178(1)(a) exception.

[17] Justice Willcock upheld the chambers judge's conclusion that the Commission's administrative penalties and disgorgement orders came within the s. 178(1)(e) exception. He held that the Poonians' debts had arisen from obtaining property, in the form of millions of dollars, by fraudulent misrepresentation, that is, through their market manipulation.

[18] In *Hennig*, the Alberta Court of Appeal held that "[t]he required link between the fraudulent statement and the debt is established only if the debtor makes the fraudulent statement to the creditor relying on s 178(1)(e)" (para. 78). Under this approach, the Poonians would have had to make their fraudulent misrepresentation to the Commission itself. The s. 178(1)(e) exception would not be applicable, because the Poonians' fraudulent misrepresentation was made not to the Commission but rather to the victim investors.

[19] Justice Willcock rejected the narrow approach adopted by the Alberta Court of Appeal in *Hennig*. Instead, he concluded that s. 178(1)(e) is not restricted to cases in which the bankrupt made a fraudulent statement to the specific creditor relying on this provision. The Commission was therefore permitted to invoke s. 178(1)(e). Justice Willcock concluded that both the administrative penalties and the disgorgement orders imposed by the Commission were non-dischargeable debts under s. 178(1)(e), because they had arisen from the Poonians having obtained property by false pretences or fraudulent misrepresentation.

IV. Issues

[20] This appeal raises two issues:

1. Do the Commission’s administrative penalties and disgorgement orders against the Poonians constitute debts falling within s. 178(1)(a) of the *BIA*, such that they are not released by an order of discharge and therefore survive bankruptcy?
2. Do the Commission’s administrative penalties and disgorgement orders against the Poonians constitute debts or liabilities falling within s. 178(1)(e) of the *BIA*, such that they are not released by an order of discharge and therefore survive bankruptcy?

V. Analysis

A. *General Principles Governing the Discharge of a Bankrupt*

[21] The proper interpretation of the *BIA* “requires the acceptance of the principle that every claim is swept into the bankruptcy and that the bankrupt is released from all of them upon being discharged unless the law sets out a clear exclusion or exemption” (*Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, at para. 20). This general rule is codified in s. 178(2), which states that “[s]ubject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.” The purpose of s. 178(2) “is to give effect to one of the goals underlying the *BIA*

regime — the financial rehabilitation of the debtor — by releasing ‘the bankrupt from all claims provable in bankruptcy’” (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 77). Through discharge, the “honest but unfortunate” debtor is given a fresh start and is provided “with relief from the weight of oppressive indebtedness” (*Moloney*, at para. 77, citing L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf), at p. 1-2.1; J. D. Honsberger and V. W. DaRe, *Honsberger’s Bankruptcy in Canada* (5th ed. 2017), at p. 478). This process also allows “the discharged bankrupt to reintegrate into economic life so he or she can become a productive member of society” (*Moloney*, at para. 36).

[22] While financial rehabilitation is an important goal of the *BIA*, it has its limits. These limits are set out in both ss. 172 and 178(1) of the *BIA* (*Moloney*, at para. 37). Section 172 provides that an order of discharge may be granted, refused, its operation may be suspended, or it may be granted subject to conditions. Section 178(1) lists specific debts that are not released by discharge and that survive bankruptcy. “These provisions demonstrate Parliament’s attempt to balance financial rehabilitation with other policy objectives, such as confidence in the credit system, that require certain debts to survive bankruptcy” (*Moloney*, at para. 37, citing R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at pp. 273 and 289). Both of these sections play a distinct and crucial role in the discharge process. I address each of them in turn.

(1) Section 172: Court May Grant or Refuse Discharge

[23] Section 172 of the *BIA* addresses the discharge of a bankrupt. It establishes that, on the hearing of a bankrupt's application for discharge, a bankruptcy court retains broad discretion to grant or refuse an absolute order of discharge, to suspend the operation of such an order for a specified time or to grant a conditional order of discharge. The *BIA* provides no guidance for the exercise of this discretion, aside from stating that a court must refuse an absolute discharge if any fact referred to in s. 173 is proven against the debtor (J. Sarra, G. B. Morawetz and L. W. Houlden, *The 2024 Annotated Bankruptcy and Insolvency Act* (2024), at § 7:69). If a court finds that any fact referred to in s. 173 is proven, the bankrupt's discharge must be refused, suspended or granted conditionally (s. 172(2)). Many of those facts bear directly on the bankrupt's conduct and culpability, while others reflect standards of commercial morality (s. 173(1)(a) to (o); R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 297-98). For example, ss. 172(2) and 173(1)(k) establish that a bankrupt who is guilty of any fraud or fraudulent breach of trust is not entitled to an absolute discharge.

[24] A court has broad discretion under s. 172(1). In exercising that discretion, the court considers three factors: the interests of the creditors in obtaining payment of their claims, the interests of the bankrupt in obtaining relief from his or her financial obligations, and the integrity of the bankruptcy process (F. Bennett, *Bennett on Bankruptcy* (26th ed. 2024), at p. 737, citing *Shakell, Re* (1988), 70 C.B.R. (N.S.) 270 (Ont. S.C.J.); *Phenix, Re* (1989), 76 C.B.R. (N.S.) 82 (Sask. Q.B.)).

(2) Section 178(1): Debts Not Released by Order of Discharge

[25] Section 178(1) sets out a specific list of debts that are not released by an order of discharge and that therefore survive bankruptcy (*Moloney*, at para. 37). These debts are non-discretionary exceptions to the general rule and represent “the kind of claims that society, through Parliament, considers to be of a quality that outweighs any possible benefit in the bankrupt being relieved of them” (Sarrazin, Morawetz and Houlden, at § 7:185, citing *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197 (Q.B.)).

[26] The exceptions in s. 178(1)(a) through (h) must be interpreted narrowly and applied only in clear cases (*Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53, at para. 25; *Korea Data Systems (USA), Inc. v. Amazing Technologies Inc.*, 2015 ONCA 465, 126 O.R. (3d) 81, at para. 63). A narrow interpretation is required partly because courts have no discretion respecting their application: “. . . the policy objective protected by the exception must, in all circumstances, trump the discharge of the bankrupt” (H. Murray and H. Fisher, “You’re Hot and You’re Cold, You’re Yes and You’re No: Conflicting Appellate Decisions Regarding Whether Regulators’ Fines, Penalties or Restitution Orders Survive Bankruptcy”, in J. Corraini and D. B. Nixon, eds., *Annual Review of Insolvency Law 2022* (2023), 569, at p. 618; J. Girgis and T. G. W. Telfer, “Do Securities Commission Debts Survive a Bankruptcy Discharge? An Analysis of *Poonian v. British Columbia (Securities Commission)* (BCCA)” (2023), 67 *Can. Bus. L.J.* 438 (“Girgis and Telfer (2023)”), at pp. 453-54). Section 178(1) is not “a catchall of debts arising from morally objectionable conduct”, but rather sets out “categories of specific wrongful conduct that give rise to debts that are not released, and specifies the criteria to be applied” (*Shaver-Kudell Manufacturing*

Inc. v. Knight Manufacturing Inc., 2021 ONCA 925, 160 O.R. (3d) 205, at para. 39; see also A. Nocilla, “Comment on *Shaver-Kudell Manufacturing Inc. v Knight Manufacturing Inc.*” (2022), 45:2 *Man. L.J.* 177, at p. 187).

[27] The s. 178(1) exceptions must also be interpreted narrowly because of the fact that “the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate” (*Moloney*, at para. 79; see also *Schreyer*, at para. 19; *Martin v. Martin*, 2005 NBCA 32, 282 N.B.R. (2d) 61, at para. 11). As a result, “[w]here there is doubt as to whether a creditor falls within an exemption, the benefit should go to the bankrupt” (*Murray and Fisher*, at p. 576, citing *Jerrard*, at p. 206).

(3) The Poonians’ Application for Discharge Was Refused Under Section 172

[28] In 2020, the Poonians applied for discharge under s. 172 (2020 BCSC 547, 78 C.B.R. (6th) 135 (“Discharge Application reasons”), aff’d 2021 BCSC 222, 86 C.B.R. (6th) 263, aff’d 2021 BCCA 417, 58 B.C.L.R. (6th) 276). Their application was opposed by the Commission and the Minister of National Revenue primarily on the basis that the fact referred to in s. 173(1)(a) was proven: the Poonians’ assets were not of a value equal to \$0.50 on the dollar of the amount of their unsecured liabilities. The Commission and the Minister alleged that the Poonians’ precarious financial situation had arisen from circumstances for which the Poonians could justly be held responsible (para. 29).

[29] The Supreme Court of British Columbia refused the Poonians' application for an absolute discharge and held that it was impossible "to conclude on these facts that the vast disparity between the Poonians' assets and liabilities arose from circumstances for which they cannot justly be held responsible" (Discharge Application reasons, at para. 53). The court also refused the Poonians' application for a suspended discharge on the basis that granting such a discharge "would be contrary to the public interest" (para. 60). The court concluded that the "circumstances of this case are extreme and that the pre-bankruptcy conduct of the Poonians requires the court to distance itself from their efforts to use the bankruptcy process to absolve themselves of the financial consequences of their actions" (para. 69). As of the date of the hearing before our Court, the Poonians remained undischarged bankrupts. As demonstrated by their unsuccessful application for discharge, even if a claim does not fall within a s. 178(1) exception, a bankruptcy court still retains the discretion to refuse an order of discharge under s. 172.

[30] The question before our Court is whether the Commission's administrative penalties and disgorgement orders can be characterized as debts not released by an order of discharge under one of the exceptions in s. 178(1). As the creditor, the Commission bears the onus of proving that its claims fall within one of the listed exceptions (*Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24). While the Poonians' application for discharge under s. 172 failed, if the Commission succeeds in proving that its claims come under a s. 178(1) exception,

this will mean that those claims cannot be released notwithstanding any future order of discharge the Poonians may seek.

B. *Do the Commission's Claims Fall Within the Section 178(1) Exceptions?*

(1) Section 178(1)(a)

[31] For a debt to survive bankruptcy under s. 178(1)(a), the creditor must establish that the debt is (1) a fine, penalty, restitution order or other order similar in nature, (2) imposed by a court, and (3) imposed in respect of an offence:

178 (1) An order of discharge does not release the bankrupt from

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

[32] This appeal raises two questions with respect to the proper interpretation of s. 178(1)(a). First, must the fines, penalties and orders referred to in this section be imposed in either a criminal or quasi-criminal context? Second, do the words “imposed by a court” capture orders that are initially imposed by an administrative tribunal but that are subsequently registered as judgments of a superior court?

(a) *Section 178(1)(a) Is Not Limited to Orders Imposed in a Criminal or Quasi-Criminal Context*

[33] It is clear that the terms “fine” and “penalty” in s. 178(1)(a) include at least monetary penalties imposed as punishment for offences in criminal or quasi-criminal proceedings (see *Hennig* (C.A.), at paras. 46-51; *Air Canada, Re* (2006), 28 C.B.R. (5th) 317 (Ont. S.C.J.), at para. 42; *Chaytor, Re*, 2006 BCSC 1742, 26 C.B.R. (5th) 574, at para. 38; *Belair v. Gottschlich*, 2008 ABQB 47, 89 Alta. L.R. (4th) 268, at para. 25; *R. v. Manzioros*, 2004 MBQB 121, 183 Man. R. (2d) 279, at para. 40; *Chambre des notaires du Québec v. Dugas*, [2003] R.J.Q. 1, at para. 22; *Simone v. Daley* (1999), 43 O.R. (3d) 511, at p. 522; *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.* (1999), 123 O.A.C. 288, at para. 19; D. Brochu, *Précis de la faillite et de l’insolvabilité* (6th ed. 2022), at ¶31-5).

[34] The chambers judge and Willcock J.A. both agreed that penalties imposed in a criminal or quasi-criminal context are clearly captured by s. 178(1)(a), but they found that this section is not limited to fines, penalties and restitution orders imposed in such a context. The chambers judge held that the inclusion of restitution orders, which do not seek to punish but rather to compensate and restore, “implies a broader scope to s 178(1)(a) than criminal or quasi-criminal offences” (para. 85). Justice Willcock agreed, holding that “s. 178(1)(a) has occasionally been interpreted too narrowly in that respect” (para. 39).

[35] Like the chambers judge and Willcock J.A., I am of the view that s. 178(1)(a) is not restricted to penalties associated with criminal or quasi-criminal proceedings. The plain and ordinary meaning of s. 178(1)(a), a comparative reading of

the English and French versions of this section, and the legislative history of the section all support this interpretation. While I have explained that the s. 178(1) exceptions must be interpreted narrowly, this interpretive principle does not have primacy over other principles of statutory interpretation that clearly support a particular meaning.

[36] As a first remark, I note that the plain and ordinary meaning of s. 178(1)(a) quite simply does not limit this section to penalties imposed in a criminal or quasi-criminal context (see *Vancouver (City) v. Alliston*, 2003 BCPC 105, 47 C.B.R. (4th) 142, at paras. 19-20 and 22). In fact, this section employs very broad language. The English version of s. 178(1)(a) merely requires that the fine, penalty, restitution order or other order be “in respect of an offence”. The words “in respect of” are of “the widest possible scope” in conveying a link between related subject matters (*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, at para. 26).

[37] The English and French versions of s. 178(1)(a) are slightly different. Importantly, the words “in respect of an offence” in the English version are absent from the French version. “The shared meaning rule for the interpretation of bilingual legislation dictates that the common meaning between the English and French legislative texts should be accepted” (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 203, citing R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 99 et seq., and M. Bastarache et al., *The Law of Bilingual Interpretation* (2008), at pp. 32 et seq.). The shared meaning rule

points to a broader reading of s. 178(1)(a) that encompasses any fine, penalty, restitution order or other order that is imposed by a court. Under this interpretation, there is no indication that such an order needs to be imposed in a criminal or quasi-criminal context.

[38] Notwithstanding this difference between the English and French versions of s. 178(1)(a), I note that, in any event, the unqualified term “offence” is not necessarily restricted to a criminal or quasi-criminal context. Offences can also exist in a regulatory context; statutes outside of the criminal or quasi-criminal context frequently deem certain contraventions of their provisions to be offences (J. Swaigen and S. McRory, *Regulatory Offences In Canada: Liability and Defences* (2nd ed. 2018), at p. 9). Indeed, in this case, a contravention of s. 57 of the *Securities Act* is deemed to be an offence under s. 155(1)(b) of that Act.

[39] Furthermore, the legislative history of s. 178(1)(a) demonstrates that Parliament’s intention has been to expand the scope of this section, not to restrict it. A previous version of this section, as it appeared from 1985 until 1992, read as follows:

178 (1) An order of discharge does not release the bankrupt from

(a) any fine or penalty imposed by a court or any debt arising out of a recognizance or bail bond;

[40] In 1992, *An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 64, widened the scope of s. 178(1)(a):

64. (1) Paragraph 178(1)(a) of the said Act is repealed and the following substituted therefor:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

[41] Parliament intentionally added this more expansive language to s. 178(1)(a). Interpreting this broad language as capturing only penalties imposed in a criminal or quasi-criminal context would run counter to Parliament’s intent and would also render the words or “other order similar in nature” surplusage (C.A. reasons, at para. 41). It is a well-accepted principle that such an interpretation is to be avoided (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28; see further, R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 8.03).

[42] Ultimately, if Parliament had intended to limit the application of this section to criminal or quasi-criminal proceedings, it could have done so more clearly. The fines, penalties, restitution orders and other orders that it exempts are not restricted to those imposed in a criminal or quasi-criminal context.

(b) *The Words “Imposed by a Court” Do Not Capture Orders Made by Administrative Tribunals That Are Subsequently Registered as Judgments of a Court*

[43] For a debt to survive bankruptcy pursuant to s. 178(1)(a), the creditor must establish that the debt is a fine, penalty, restitution order or other order similar in nature

that was “imposed by a court”. There is some uncertainty about what constitutes a “court” for the purposes of s. 178(1)(a) and about what is meant by the term “imposed”.

[44] The word “court” as it appears in s. 178(1)(a) is undefined. While this word is defined in s. 2 of the *BIA*, the definition specifically excludes s. 178(1)(a):

2 In this Act,

...

court, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act;

[45] Subsections 183(1) and (1.1) of the *BIA* refer to the superior courts of each province and territory. The exclusion of s. 178(1)(a) from the definition in s. 2 suggests that Parliament did not intend to limit the application of s. 178(1)(a) to fines, penalties or restitution orders made by superior courts (C.A. reasons, at para. 42). In this way, the s. 2 definition draws a distinction between a court administering the *BIA* process and other courts that may impose fines, penalties or restitution orders for the purposes of s. 178(1)(a) (*J.R.B. v. Jimenez*, 2018 ABQB 847, at para. 23 (CanLII)). Provincial courts, federal courts, appellate courts and this Court all fall within the meaning of “court” for the purposes of s. 178(1)(a) (see Sarra, Morawetz and Houlden, at § 1:26).

[46] However, the word “court” in s. 178(1)(a) does not capture administrative tribunals or regulatory bodies. The term “court” implies that a dispute will be

adjudicated by a judge or judges (*Black's Law Dictionary* (11th ed. 2019), at p. 444). By comparison, an “administrative tribunal” is “[a] court-like decision-making authority that resolves disputes [or] an administrative agency exercising a quasi-judicial function” (p. 1814). A “regulatory agency” can be defined as “[a]n official body, esp. within the government, with the authority to implement and administer particular legislation” (pp. 77-78 and 1538). “Court” refers to the judiciary, whereas administrative bodies are hybrid entities “falling between the judiciary and government departments created to perform as separate bodies functions transferred from both” (L. Sossin, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), at § 2:1).

[47] Moreover, for the purposes of s. 69.6 of the *BIA*, Parliament saw it fit to define the term “regulatory body”.¹ While the definition is limited to that section and does not apply to s. 178(1)(a), the decision to set out a specific definition of “regulatory body” further confirms that Parliament intended these different terms — “court” and “regulatory body” — to be understood as having different meanings (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 81; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 53). Thus, the word “court” in s. 178(1)(a) does not include administrative bodies. If Parliament had wanted fines,

¹ Section 69.6(1) of the *BIA* reads as follows:

69.6 (1) In this section, **regulatory body** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

penalties, restitution orders or other orders similar in nature imposed by regulatory bodies, administrative tribunals or other administrative decision makers to be exempt from discharge under s. 178(1)(a), it could have said so expressly.

[48] Having defined the term “court”, I now consider what it means for a fine, penalty or order to be “imposed by a court”. The Commission argues that this language captures orders that are imposed by an administrative tribunal and that, once registered with a court, are deemed by statute to be enforceable as orders of that court (R.F., at para. 93). It argues that its disgorgement orders and administrative penalties fall within the ambit of s. 178(1)(a) of the *BIA* because, under s. 163(2) of the *Securities Act*, once a decision it has made is filed with the Supreme Court of British Columbia, the decision has the same force and effect as if it were a judgment of that court:

163 (1) If the commission has made a decision under section 161 or 162, or if the executive director has made a decision under section 161, the commission or the executive director, as applicable, may file the decision at any time in a Supreme Court registry by filing a certified copy of the decision.

...

(2) Upon filing, a decision referred to in subsection (1), (1.1) or (1.2) or a notice, order or decision referred to in subsection (1.01) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

[49] The effect of an administrative decision being registered with a court is that the creditor is able to use civil methods to enforce the decision as if it were a judgment of that court. The registration of the decision does not change the fact that it

was made and imposed by an administrative decision maker, nor does it overcome the BIA's requirement that the exempt debt be imposed by a court (C.A. reasons, at para. 48; *Hennig* (C.A.), at para. 52). When a decision is registered with a court, the court's involvement is passive, whereas the act of "imposing" a fine, penalty, restitution order or other order similar in nature requires that the court be actively involved in making the decision (see *Hennig* (C.A.), at para. 52).

[50] Justice Willcock correctly concluded in this case that s. 178(1)(a) "is broad enough to include at least fines, penalties and restitution orders imposed by courts other than the superior courts of the provinces, but cannot be read so broadly as to include fines imposed by tribunals that are registered in a court" (para. 44).

(c) *Application of Section 178(1)(a) to the Commission's Orders*

(i) The Commission's Administrative Penalties Are Not Exempt From Discharge Under Section 178(1)(a)

[51] In light of the foregoing, the Commission's argument that the administrative penalties it imposed on the Poonians are captured by the s. 178(1)(a) exception must fail. While the administrative penalties were imposed in respect of a statutory offence (*Securities Act*, ss. 57(a) and 155(1)(b)), they were not imposed by a court. They were imposed by the Commission — a regulatory agency.

(ii) The Commission's Disgorgement Orders Are Not Exempt From Discharge Under Section 178(1)(a)

[52] In the same way, the Commission’s disgorgement orders are not captured by s. 178(1)(a). The disgorgement orders were imposed by the Commission, not by a court.

(2) Section 178(1)(e)

[53] The Commission also relies on the s. 178(1)(e) exception:

178 (1) An order of discharge does not release the bankrupt from

...

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

[54] For a debt or liability to survive bankruptcy pursuant to s. 178(1)(e), the creditor must establish three elements: (1) false pretences or fraudulent misrepresentation; (2) a passing of property or provision of services; and (3) a link between the debt or liability and the fraud (*Hennig* (C.A.), at para. 57, citing *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143, at para. 16).

[55] My colleague Karakatsanis J. and certain courts have held that s. 178(1)(e) embodies a “morality concep[t]” which “ensures that a deceitful wrongdoer will not be able to use the court system and the state’s bankruptcy provisions as a mechanism for avoiding the consequence of his or her actions” (*Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82, at para. 15; see also *Jerrard*, at p. 206; *Bryant*

v. Benjamin, 2023 QCCA 1021, at para. 42 (CanLII); see Karakatsanis J.’s reasons, at paras. 138-39). While I essentially agree that s. 178(1)(e) targets morally blameworthy conduct, I share the view stated by Professors Girgis and Telfer:

... the common feature that underlies most cases interpreting section 178(1)(e), though sometimes imperfectly expressed, is the protection of creditors who have been victimized by deceitful statements. The case law in this area interprets this provision to target morally blameworthy conduct that gave rise to debt, not simply morally blameworthy conduct. [Emphasis added.]

((2023), at p. 452; see also *Shaver-Kudell*, at para. 23.)

[56] The Superintendent of Bankruptcy takes a similar view. Intervening on appeal, the Superintendent explains that s. 178(1)(e) “is aimed at making fraud victims whole, rather than at preserving penalties imposed for deterrence purposes” (I.F., at para. 18). By not releasing debts or liabilities that resulted directly from deceit, s. 178(1)(e) prevents debtors “from profiting as a result of their wrongdoing” (*H.Y. Louie Co. v. Bowick*, 2015 BCCA 256, 386 D.L.R. (4th) 117, at para. 47, per Newbury J.A., dissenting, but not on this point). I therefore disagree with my colleague that the “central focus” of s. 178(1)(e) is “deceitful conduct”, not the “gain derived” from that conduct (para. 126 (emphasis deleted)). I am of the view that in the interpretation of s. 178(1)(e), “deceitful conduct” and “gain derived” are two inextricably linked concepts.

[57] Furthermore, it is through s. 172 of the *BIA* that Parliament has entrusted bankruptcy courts with broad discretion to decide whether morally reprehensible

conduct should prevent a bankrupt from being discharged. Bankrupts who are not “honest but unfortunate” are not discharged or only discharged if certain conditions are met. In contrast, the s. 178(1) exceptions are focused on “excluding specific debts from being released by the order of discharge” (*Moloney*, at para. 85). I therefore do not agree with my colleague that s. 178(1)(e)’s “intention [is] to preclude dishonest debtors from benefitting from their dishonesty” (para. 139 (emphasis added)). As I have explained above, the “intention” behind this provision is more nuanced.

[58] In *Deloitte Restructuring*, our Court interpreted s. 19(2)(d) of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which “is analogous in every respect to” s. 178(1)(e) of the *BIA* (para. 24; 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 74; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 78). Articulating the section’s elements in a four-part test, our Court held as follows:

To discharge its burden of proving that its claim relates to a debt “resulting from obtaining property or services by false pretences or fraudulent misrepresentation”, a creditor must establish on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service

(*Deloitte Restructuring*, at para. 25)

[59] This test applies in determining whether the administrative penalties and disgorgement orders are exempt from discharge under s. 178(1)(e). Prior to applying this test to the Commission’s administrative penalties and disgorgement orders, I

provide some guidance on each of s. 178(1)(e)’s three elements, which are reflected in, and form the basis of, the four-part *Deloitte Restructuring* test.

[60] At the outset, I note that the first step of the *Deloitte Restructuring* test may appear to stand for the proposition that only the creditor who was directly victimized by the false pretences or fraudulent misrepresentation may bring a claim under s. 178(1)(e). As I explain below, that is not the case.

(a) *False Pretences or Fraudulent Misrepresentation*

[61] The terms “false pretences” and “fraudulent misrepresentation” are not defined in the *BIA*, but the case law has been unanimous in finding that deceitful statements are at the core of both (*Shaver-Kudell*, at paras. 5 and 42; see also C.A. reasons, at paras. 55 and 58-60; *Hennig* (C.A.), at para. 58; *Cruise Connections*, at para. 13; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261, at para. 29 (CanLII); *Buland Empire*, at para. 14). For both concepts, the “essential test . . . is that the property was obtained by ‘deceit’, whether by positive act or failure to disclose material facts” (Sarra, Morawetz and Houlden, at § 7:199; see also *Hennig* (C.A.), at para. 112, per Pentelechuck J.A., concurring; *Iroquois Falls Community Credit Union Ltd. (Liquidator of) v. Miljours* (2009), 52 C.B.R (5th) 231 (Ont. S.C.J.), at para. 18).

[62] To establish “fraudulent misrepresentation” for the purposes of s. 178(1)(e), courts have relied on the classic elements from the House of Lords’ decision in *Derry v. Peek* (1889), 14 App. Cas. 337, at p. 374 (Sarra, Morawetz and

Houlden, at § 7:203; Wood, at p. 317; J. Girgis and T. G. W. Telfer, “The Fraudulent Misrepresentation and False Pretences Exception to the Bankruptcy Discharge: Balancing the Debtor’s Fresh Start with Confidence in the Credit System”, in Corraini and Nixon, eds., *Annual Review of Insolvency Law 2022*, 143 (“Girgis and Telfer (2022)”), at p. 154; *Hennig* (C.A.), at para. 58; *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 255 Man. R. (2d) 45; *Morris Bureau v. Darde*, 2013 NSCA 121, 335 N.S.R. (2d) 378; *Woolf v. Harrop* (2003), 50 C.B.R. (4th) 309 (Ont. S.C.J.), at para. 71). These elements are as follows: (i) a representation was made; (ii) the representation was false; (iii) the representation was made knowingly, without belief in its truth (including with willful blindness or recklessness); and (iv) the creditor relied on the representation and turned over property to the debtor.

[63] As for “false pretences” in s. 178(1)(e), courts have relied on s. 361(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, for a definition of this term (*Shaver-Kudell*, at paras. 26-28; *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109, at para. 63, aff’d 2016 ONCA 875). Section 361(1) states:

361 (1) A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

[64] Therefore, it appears that the elements of fraudulent misrepresentation and false pretences are substantively the same, except that the definition of “false pretence” in s. 361(1) of the *Criminal Code* does not require detrimental reliance. However, given

that s. 178(1)(e) of the *BIA* requires that property or services be obtained as a result of the fraudulent misrepresentation or false pretences, “that difference is immaterial in this context” (Girgis and Telfer (2022), at p. 154, citing *Hennig* (C.A.), at para. 58).

[65] Justice van Rensburg came to this same conclusion in *Gray*, noting that “[i]rrespective of whether one considers fraudulent misrepresentation or false pretences, s. 178(1)(e) requires a finding that the bankrupt ‘obtained property by’ such conduct” (para. 31; see also *Shaver-Kudell*, at paras. 30 and 35; *Hennig* (C.A.), at para. 58). “Most cases, when discussing s. 178(1)(e), treat fraudulent misrepresentation and false pretences as closely connected terms with the same requirements” (*Shaver-Kudell*, at para. 35). As a result, the *Deloitte Restructuring* test does not distinguish between the terms “false pretences” and “fraudulent misrepresentation”. The overlap between the two terms ensures that debts or liabilities obtained by deceit that otherwise fulfill the s. 178(1)(e) elements are not discharged.

[66] The onus is on the creditor to prove that the debts or liabilities were obtained as a result of the debtor’s false pretences or fraudulent misrepresentation. A court cannot take judicial notice of fraud (B. Durnford, “Recent Developments under Section 178(1)(a) and (e) of the *Bankruptcy and Insolvency Act*: A Case Study of *Poonian v. British Columbia (Securities Commission)*” (2023), 12 *J.I.I.C.* 107, at p. 128; see also p. 123, citing *Hennig* (C.A.), at para. 70, citing *Canada (Attorney General) v. Bourassa (Trustee of)*, 2002 ABCA 205, 6 Alta. L.R. (4th) 223), nor can a court infer fraud in a cursory manner (*Deloitte Restructuring*, at para. 21). A party

cannot simply presume or assume that a claim resulted from a deceitful statement without proving the required elements (*Deloitte Restructuring*, at para. 26).

[67] There are a number of ways in which a claimant can establish false pretences or fraudulent misrepresentation for the purposes of s. 178(1)(e). The most straightforward is via a prior judgment that contains findings of fact to the effect that a debt resulted from false pretences or fraudulent misrepresentation (Wood, at p. 313; *Hennig* (C.A.), at para. 62). Where a claimant has obtained a judgment that contains sufficient findings of fact, “nothing else need be done” (Wood, at p. 313; see also *Bryant*, at para. 69). If a judgment does not make express findings as to the necessary elements, it is open to the bankruptcy court to consider the pleadings that were available to the court that rendered a prior judgment, as well as the proceedings before that other court, in order to determine whether the elements can be established on the basis of those documents. A bankruptcy court can therefore look to the entire context of the proceedings in a previous action to determine whether the judgment debt can be characterized as one falling within the ambit of s. 178(1)(e) (*Cruise Connections*, at para. 29, citing *H.Y. Louie*, at paras. 87-88; see also *Lawyers’ Professional Indemnity Co. v. Rodriguez*, 2018 ONCA 171, 139 O.R. (3d) 641, at para. 33; *Hennig* (C.A.), at para. 62).

[68] However, “even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings”, a court must generally make its own findings of fact in

applying s. 178(1)(e) of the *BIA* (*Deloitte Restructuring*, at para. 29). Courts must be “consistent and rigorous in assessing the evidence presented to them in this regard” (para. 29; see also *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164, at paras. 13-19 (CanLII)). It follows that “the evidence tendered to prove fraud or dishonesty must be ‘clear and cogent’” (*Sharma v. Sandhu*, 2019 MBQB 160, at para. 26 (CanLII)).

[69] In the case of a debt or liability resulting from a finding by an administrative tribunal, an application judge must make his or her own determination, based on a review of the record, as to whether the debt or liability falls within a s. 178(1) exception (*Hennig* (C.A.), at para. 63). Thus, even where all of the required findings for false pretences or fraudulent misrepresentation have been expressly made by an administrative decision maker, “[a] determination of whether the claim falls within one of the categories of non-dischargeable claims must be made by a court” (Wood, at p. 314). In sum, for a creditor to be able to pursue its claim against a bankrupt under s. 178(1)(e), a court order declaring fraud must be obtained, whether “before, during or after a discharge from bankruptcy” (*Bourassa*, at para. 5).

(b) *Passing of Property or Provision of Services*

[70] The second requirement for a debt or liability to survive bankruptcy under s. 178(1)(e) is that there must have been a passing of property or provision of services. This requirement is reflected in the final element of the *Deloitte Restructuring* test, which is that “the false representation was made to obtain property or a service”

(para. 25). There must be a loss in the form of a transfer of property or delivery of services, as well as a debt or liability corresponding to that loss.

[71] The Poonians argue that s. 178(1)(e) should apply only when the debtor, and not a third party, obtains the property or services (A.F., at paras. 72-75). I disagree.

[72] This argument was also made and rejected in *McAteer v. Billes*, 2006 ABCA 312, 397 A.R. 365. The bankrupt argued that “property must pass to the bankrupt in order for s. 178(1)(e) to apply” (para. 8). The Alberta Court of Appeal held that “s. 178(1)(e) does not require property to pass to the tortfeasor in cases of fraudulent misrepresentation” (para. 7, citing *Morgan v. Demers* (1986), 71 A.R. 244 (C.A.)). I agree. The section does not specify that the “person perpetrating the fraud must be the person who obtained the property” (*Varvis (Bankrupt), Re*, 1999 ABQB 853, 254 A.R. 197, at para. 8).

[73] Section 178(1)(e) does not require that the bankrupt be the recipient of the property of which a person was deprived. The property need not have been obtained, or retained, by the bankrupt. It may have passed directly or indirectly from the person to a third party at the bankrupt’s direction or on his or her behalf (*Merenick*, at para. 18). What is required is that the fraudulent misrepresentation induced a person to give the property to some other person (see *Wood*, at p. 317, citing *McAteer* (2006), and *Merenick*). That other person may be the bankrupt or someone associated with the bankrupt.

(c) *Link Required Between the Debt or Liability and the Fraud*

[74] Section 178(1)(e), in using the expression “resulting from”, requires a causal link between the creation of the debt or liability and the debtor’s deceit. In other words, to come within s. 178(1)(e), the debt or liability must have been created as a result of false pretences or fraudulent misrepresentation (Sarrazin, Morawetz and Houlden, at § 7:198). Section 178(1)(e) therefore requires detrimental reliance by a person (*Shaver-Kudell*, at para. 30). However, as I explain in the next section, that person need not be the creditor.

[75] The words “resulting from” in s. 178(1)(e) connote a strict causation requirement. This is especially so given that the s. 178(1) exceptions must be interpreted narrowly. It is not sufficient that “the debt or liability ‘arose out of’ a fraudulent scheme” (*Gray*, at para. 31). Nor is it sufficient for a debt or liability to be “in respect of”, “in connection with” or “in relation to” a fraudulent scheme. Indeed, Parliament’s intention to impose a strict causation requirement by choosing the words “resulting from” becomes clear when s. 178(1)(e) is compared with s. 178(1)(a), which employs the term “in respect of”. As noted by Dickson J. (as he then was), “[t]he phrase ‘in respect of’ is probably the widest of any expression intended to convey some connection between two related subject matters” (*Nowegijick*, at p. 39; *Markevich*, at para. 26; see also Sullivan (7th ed.), at § 4.05). The same cannot be said of the phrase “resulting from”, which requires a causal link: a debt or liability was caused by the

debtor (or someone associated with the debtor) having obtained property or services by false pretences or fraudulent misrepresentation.

[76] Section 178(1)(e) thus requires a “direct link”. The direct link approach holds that only the debt or liability that represents the “value of the property [or services] obtained by false pretences or fraudulent misrepresentation” qualifies as non-dischargeable (*Molloy v. Janes & Noseworthy Ltd.* (1998), 164 Nfld. & P.E.I.R. 176 (Nfld. C.A.), at para. 8; see also Sarra, Morawetz and Houlden, at § 7:202). This approach “is more consistent with the fresh start policy underlying bankruptcy law, since it limits the exception to the value obtained by the debtor as a result of her dishonesty” (Wood, at p. 318).

[77] The direct link requirement has been recognized and applied by several courts across Canada. In *Gray*, van Rensburg J.A. held that “[a] causal connection between the bankrupt’s wrongdoing and the creation of the debt or liability is required” (para. 31). In *Shaver-Kudell*, Zarnett J.A. held that a deceitful statement by the debtor “must be the source of the debt or liability to the creditor” (para. 35). In *The Workers’ Compensation Board v. Petkau*, 2018 SKCA 85, 429 D.L.R. (4th) 92, Schwann J.A. held that “there has to be evidence of a causal connection between the alleged fraud and the debt or liability said to have resulted from it” (para. 45). In *Pietrzak, Re* (2016), 39 C.B.R. (6th) 145 (Ont. S.C.J.), Master Mills concluded that “[i]t is not sufficient to show that a fraudulent misrepresentation or false pretence was made unless it is also shown that the property or service was obtained directly as a result thereof” (para. 9).

In *McAteer* (2007), the Alberta Court of Appeal held that s. 178(1)(e) requires “a finding of fraud, misrepresentation, or other reprehensible conduct that is clearly linked to the bankrupt’s debt” (para. 28; see also *Groupe Unigesco inc. v. Michaud*, 2021 QCCQ 10330, at paras. 18-20 (CanLII); *Water Matrix Inc.*, at para. 61; *Dead End Survival, LLC v. Marhasin*, 2020 ONSC 766, 77 C.B.R. (6th) 299, at para. 22).

[78] While the direct link requirement is rooted in ample authority, some courts have applied a less stringent standard. For example, the standard has been described as a “but-for” test: “But for the fraudulent misrepresentation by the [debtor], [the] Corporation would not have loaned him [the money]” (*Woolf*, at para. 72). The requisite link has also been described as “a material connection”: “The false statement made by the defendant need only be materially connected to the actions of the plaintiff that resulted in damage” (*Morris Bureau*, at para. 18). Respectfully, I am not convinced that a debt or liability that is not directly linked to a deceitful statement by the debtor, or someone associated with the debtor, can survive a discharge from bankruptcy on the basis of the s. 178(1)(e) exception. The proper scope of s. 178(1)(e) “requires a deceitful statement by which the debtor obtained property or services, causing the debt or liability of the creditor to arise” (*Shaver-Kudell*, at para. 44).

[79] *Goldstein, Re*, 2011 ONSC 561, 74 C.B.R. (5th) 296, provides an illustration of the direct link requirement. In that case, a hearing panel of the Law Society of Upper Canada ruled that Mr. Goldstein had participated in dishonest or fraudulent conduct to obtain mortgage funds under false pretences, and it disbarred

him. Mr. Goldstein was ordered to pay the Law Society \$60,000 in costs in relation to the disbarment hearing. Mr. Goldstein subsequently made an assignment in bankruptcy. The Law Society sought a declaration under s. 178(1) of the *BIA* that the costs award would not be released by any discharge. Justice Morawetz concluded that the costs award resulted not from the fraud but rather from the Law Society disbarment hearing (para. 10). The costs award was therefore not directly linked to the fraud committed by Mr. Goldstein.

[80] My colleague would apply a less stringent causal link, one that does not limit the non-dischargeable debt or liability under s. 178(1)(e) to the value of the property or services obtained by deceit (paras. 118 and 125). She cites cases where courts have deemed punitive damages to be non-dischargeable debts under s. 178(1)(e) even though they exceed the value of the property or services obtained by deceit (para. 128). Punitive damages do not represent the value of property or services obtained by false pretences or fraudulent misrepresentation and therefore do not come within the s. 178(1)(e) exception. This does not mean, however, that such a debt will be released by an order of discharge. Punitive damages may be captured by another applicable s. 178(1) exception or by s. 172 of the *BIA*.

[81] I reiterate that s. 178(1) is not a “catchall of debts arising from morally objectionable conduct” (*Shaver-Kudell*, at para. 39). With respect, I disagree with my colleague that s. 178(1)(e) “should ultimately be interpreted purposively” (para. 138). My colleague’s use of the word “purposively” is simply inconsistent with our Court’s

jurisprudence, which clearly establishes that s. 178(1)(e) “must be interpreted narrowly” (*Deloitte Restructuring*, at paras. 24-25). Through s. 178(1), Parliament “identifies categories of specific wrongful conduct that give rise to debts that are not released, and specifies the criteria to be applied” (*Shaver-Kudell*, at para. 39). “[E]ven though other forms of morally objectionable conduct giving rise to debts can easily be imagined”, s. 178(1)(e) must be interpreted narrowly on the basis of “the specific terms identified” (*ibid.*). A narrow interpretation favours a direct link that limits the non-dischargeable debt or liability to the value of the property or services obtained by deceit.

[82] Thus, for a s. 178(1)(e) claim to succeed, there must be a direct link between the fraudulent statement in issue and the debt or liability the creditor is claiming.

(d) *There Is No “Direct Victim” Requirement*

[83] There is a final point I wish to address before determining whether the Commission’s administrative penalties or disgorgement orders survive a discharge from bankruptcy under the s. 178(1)(e) exception. As I previously mentioned, the first step of the *Deloitte Restructuring* test may appear to stand for the proposition that only the creditor who was the victim of the false pretences or fraudulent misrepresentation may bring a claim under s. 178(1)(e). That is not the case.

[84] In *Hennig*, Khullar J.A. (as she then was) held that “[a] creditor should only fall within s 178(1)(e) if he or she has been directly *victimized* by the fraudulent behaviour of the debtor” (para. 81 (emphasis in original)). Under this approach, “[t]he required link between the fraudulent statement and the debt is established only if the debtor makes the fraudulent statement to the creditor relying on s 178(1)(e)” (para. 78). She held that this is because “creditors deserve the preferential treatment given by s 178(1)(e) only if they are the victims of the debtor’s fraudulent behaviour” (para. 92; see also *Durnford*, at p. 125).

[85] In the Court of Appeal below, Willcock J.A. expressly rejected this direct victim requirement and held that “the plain language of s. 178(1)(e) of the *BIA* does not restrict this exception to only those claims where the bankrupt made a deceitful statement to the creditor” (para. 70).

[86] Like Willcock J.A., I am not convinced that s. 178(1)(e) requires that the claiming creditor be the direct recipient of the deceitful statement. That being said, since s. 178(1)(e) requires detrimental reliance, there will always be a person who has been deprived of property or services as a result of a deceitful statement made by the debtor or someone associated with the debtor. More often than not, the person to whom the deceitful statement was made will be the claiming creditor. However, the jurisprudence reveals circumstances in which, even though the claiming creditor was not the direct recipient of the deceitful statement, all of the s. 178(1)(e) elements were met and the debt or liability properly survived bankruptcy.

[87] For example, in *Woolf*, the creditor bank sought a declaration that its judgment debt against the bankrupt, Mr. Harrop, had not been released by the order of discharge granted. The bank was the assignee of a mortgage that Mr. Harrop had originally executed in favour of another company. When Mr. Harrop took out the mortgage, he provided a statutory declaration to the original mortgagee indicating that he did not owe any income tax arrears. That declaration was false, and Mr. Harrop knew it was false. After the original mortgagee assigned the mortgage to the bank, Mr. Harrop defaulted and the bank obtained a judgment against him for the outstanding amount. Mr. Harrop made an assignment in bankruptcy, and following his discharge the bank sought a declaration that its default judgment survived under s. 178(1)(e) because Mr. Harrop had made a fraudulent misrepresentation to the original mortgagee. Mr. Harrop argued that the bank could not rely on s. 178(1)(e) because the fraudulent misrepresentation had been made not to it but rather to the original mortgagee. He also argued that the bank had not relied on his fraudulent misrepresentation.

[88] Justice Trafford rejected Mr. Harrop's arguments. He found that the bank had acquired all the legal rights and entitlements of the original mortgagee, including the right to sue Mr. Harrop. Further, he inferred that, had the bank known of the fraudulent misrepresentation, it would not have acquired the original mortgagee's legal interest. The bank's entitlement to relief under s. 178(1)(e) was no different than what the original mortgagee's entitlement would have been.

[89] Even though the bank was not the direct victim of Mr. Harrop's fraudulent misrepresentation, the outstanding debt on the mortgage was the direct result of Mr. Harrop having obtained property by fraudulent misrepresentation. I agree with Trafford J.'s conclusion that the bank's entitlement to relief under s. 178(1)(e) was no different than that of the original mortgagee (para. 75). The bank was entitled to a declaration that its judgment debt had not been released by the order of discharge, and Mr. Harrop could not protect himself against the legal consequences of his fraudulent misrepresentation on the basis that the bank was not the direct victim (para. 75; Girgis and Telfer (2023), at p. 452; see also *Shaver-Kudell*, at para. 5).

[90] In *Ste. Rose*, the Manitoba Court of Appeal found that a liability had not been released on discharge because it fell within s. 178(1)(e), even though the creditor was not the direct victim of the false pretences. The Ste. Rose & District Cattle Feeders Co-op and the debtor had entered into an agreement providing that Co-op would authorize funding so that the debtor could purchase cattle. The agreement also required the debtor to notify Co-op when the cattle were to be sold and to ensure that the proceeds of that sale were paid directly to Co-op. The debtor and his son devised a plan whereby the son sold the cattle in his own name. The son deceitfully held out to a transport driver and an auctioneer that he owned the cattle. The proceeds of sale were deposited in the son's credit union account, in accordance with the plan. However, the son was indebted to the credit union. When the funds were deposited in the son's account, the credit union seized the amount and applied it to his debt. The debtor defaulted on repaying Co-op's loan, and Co-op suffered a corresponding loss. The

debtor and his son consented to judgment in favour of Co-op. Both the debtor and his son then made assignments in bankruptcy and were later discharged. Co-op filed an application seeking a declaration under s. 178(1)(e) that the liability of the debtor and his son arising from the judgment had not been released by the discharge.

[91] Justice Freedman held that the debtor and his son had obtained “property”, in the form of the proceeds of sale, by false pretences. This had created a liability toward Co-op, which had resulted in the judgment. The debtor had withheld relevant information from Co-op by not telling it that the proceeds of sale would be kept by his son. Co-op had relied on the debtor’s fraudulent misrepresentation to its detriment. Further, by participating in the fraudulent sale of the cattle, the debtor had kept up the false pretence that his son was entitled to the proceeds. On this basis, the debtor’s liability to Co-op survived the discharge from bankruptcy.

[92] With respect to the son’s liability to Co-op, his false statements had been made to the auction house and the truck driver, not to the creditor, Co-op. However, this third-party involvement did not change the fact that Co-op had been deprived of its property because of the son’s false statements. For this reason, the court found under s. 178(1)(e) that the debt had not been discharged.

[93] In most cases, the claiming creditor will be the party directly victimized by the false pretences or fraudulent misrepresentation. This is especially so given that the creditor bears the onus of proving that a debt or liability falls within one of the listed exceptions.

[94] In fact, it is on this basis that the *Deloitte Restructuring* test appears to endorse the direct victim requirement: “To discharge its burden of proving that its claim relates to a debt ‘resulting from obtaining property or services by false pretences or fraudulent misrepresentation’, a creditor must establish [that] the debtor made a representation to the creditor . . .” (para. 25 (emphasis added)). *Deloitte Restructuring* was a “typical” case in the sense that the City of Montréal was both the victim of the alleged fraud and the creditor invoking s. 19(2)(d) of the *Companies’ Creditors Arrangement Act*. However, the wording of s. 178(1)(e) of the *BIA* does not import a direct victim requirement. A creditor who is not a direct victim is thus not barred from bringing a claim under s. 178(1)(e) provided that the claim is the result of a person being deprived of property or services after having detrimentally relied on the debtor’s false pretences or fraudulent misrepresentation.

[95] I reject a direct victim requirement on the basis that it would read an additional requirement into s. 178(1)(e): that the statements that resulted in a person being deprived of property or services must have been made directly to the creditor, not to a third party (Girgis and Telfer (2022), at p. 183). However, the absence of a direct victim requirement does not change the fact that s. 178(1)(e) is limited to the value of the property or services obtained by false pretences or fraudulent misrepresentation.

(e) *Application of Section 178(1)(e) to the Commission’s Orders*

[96] To discharge its burden of proving that its claims relate to a debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, the Commission must establish that the Poonians knowingly made a false representation in order to obtain property or services (*Deloitte Restructuring*, at para. 25). The debt or liability being claimed must be directly linked to the Poonians' false representation.

[97] In assessing whether the Poonians knowingly made false statements, the chambers judge considered the Commission's decisions. As noted above, when a party relies on the findings and conclusions of an administrative decision maker to establish that the debtor made a fraudulent statement, the court must still make its own determination based on a review of the record, even where the administrative findings of fraud are express.

[98] On review of the Commission's Reassessment Decision, the chambers judge concluded that because the Poonians' deceitful scheme had deliberately misled the public and investors as to the true value of the OSE shares, it was "at its core a fraudulent misrepresentation and false pretense" (para. 103). In the Reassessment Decision, the Commission held that the Poonians had breached s. 57(a) of the *Securities Act* "by engaging in, or participating in, conduct that they knew, or reasonably should have known, would result in, or contribute to, a misleading appearance of trading activity in, or an artificial price for, shares of OSE Corp." (para. 6). The Poonians'

market manipulation was thus characterized as fraudulent by both the Commission and the chambers judge.

[99] Like Willcock J.A., I see no error in the chambers judge’s conclusion that the Poonians’ scheme to mislead and exploit investors amounted to fraudulent misrepresentation (para. 56). The Poonians falsely and knowingly misrepresented the price of the OSE shares in order to turn a profit. The first s. 178(1)(e) requirement is therefore met.

[100] The Poonians obtained property or services as a result of their fraudulent misrepresentation. As the chambers judge noted, “[t]hrough that scheme the Poonians ‘obtained property’, in the form of millions of dollars” (para. 103). Mr. Poonian obtained \$746,676 directly and \$572,491 indirectly through the accounts of secondary participants in the scheme. In addition, he obtained \$1,126,260 through the account of another participant and was ordered to pay that amount on a joint and several basis. Ms. Poonian obtained \$3,149,935 (Reassessment Decision, at paras. 77-79). While Mr. Poonian obtained some amounts indirectly through the accounts of other participants in the scheme, I have concluded that it is not necessary that the bankrupt directly obtain or retain the property for the s. 178(1)(e) exception to apply. As is the case here, the property may pass from a person or group of people (the deceived investors) to a third party (another participant) at the direction of the bankrupt (Mr. Poonian). The second s. 178(1)(e) requirement is therefore met.

[101] The Commission claims that both its administrative penalties and its disgorgement orders will survive any discharge from bankruptcy by operation of the exception in s. 178(1)(e) because they are debts resulting from the Poonians having obtained millions of dollars because of their fraudulent misrepresentation. To determine whether this is the case, I must consider separately whether the administrative penalties and the disgorgement orders meet the third s. 178(1)(e) requirement.

(i) The Commission's Administrative Penalties Did Not Result From the Fraudulent Scheme

[102] As noted above, a claim under s. 178(1)(e) must result from the debtor (or someone associated with the debtor) having obtained property or services by false pretences or fraudulent misrepresentation. A direct link between the debt or liability and the fraudulent conduct is required. It is only the value of the property or services obtained as a result of that conduct that is not released by an order of discharge (*Molloy*, at para. 8). On this basis, the Commission's administrative penalties do not come within the purview of s. 178(1)(e).

[103] The debt represented by the Commission's administrative penalties did not result directly from the Poonians' fraudulent misrepresentation. Rather, it arose indirectly as a result of the Commission's decision to sanction the Poonians for having obtained property through deceitful statements to investors (Girgis and Telfer (2023), at p. 448; Nocilla, at p. 186).

[104] As I explained above, *Goldstein* helps to illustrate the direct link requirement. In that case, Morawetz J. concluded that the costs award at issue resulted not from the bankrupt's fraud but rather from a Law Society disbarment hearing. Even though the Law Society found that Mr. Goldstein "had knowingly assisted or participated in dishonest or fraudulent conduct to obtain mortgage funds under false pretenses", the costs award itself did not result directly from the fraud committed by Mr. Goldstein and therefore did not fall within s. 178(1)(e) (*Goldstein*, at paras. 3 and 10-11). My colleague acknowledges that the "costs award was a step removed from and thus not 'directly caused' by the fraudulent conduct" and that the source of the liability was the disbarment hearing, not the deceit (para. 133 (emphasis in original)). However, she distinguishes *Goldstein* on the basis that, in the instant case, the Commission does not claim that the costs of its proceeding against the Poonians are non-dischargeable and that "the purpose of the Commission's hearing was to create such a debt or liability resulting directly from the false pretences" (para. 134). With respect, this distinction is untenable.

[105] Both a costs award and a penalty imposed by a regulator arise indirectly from deceitful conduct. Without the occurrence and sanctioning of that conduct, neither a penalty nor a costs award would exist. Fundamentally, however, both a costs award and an administrative penalty result from the regulator's choice to sanction the impugned conduct. Neither is the *direct result* of the deceit. In other words, but for Mr. Goldstein's fraud, there would have been no costs award. Similarly, but for the Poonians' fraud, there would be no administrative penalty. However, as I have

explained, and as my colleague acknowledges at para. 124 of her reasons, a but-for connection is not the appropriate link under s. 178(1)(e). A direct causal link is required. I therefore respectfully disagree with my colleague that the Commission’s administrative penalties “have as their *only* source or origin the Poonians’ deceitful conduct” (para. 134 (emphasis in original)). Rather, their only source is the Sanctions Decision: “Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that . . . a) [Thalbinder] Poonian pay to the Commission an administrative penalty of \$10 million; b) [Shailu] Poonian pay to the Commission an administrative penalty of \$3.5 million” (para. 96).

[106] If the exempt debt or liability is not restricted to the value of the property or services obtained by false pretences or fraudulent misrepresentation — regardless of whether the claimant is the direct victim or a party like the Commission — then s. 178(1)(e) has the potential to capture debts or liabilities that are not the direct result of deceit. My colleague relies on Justice Romaine’s interpretation of s. 178(1)(e) in *Hennig* (Q.B.) to find that the Commission’s administrative penalties are captured by this section (para. 139). That decision was reversed on appeal. Justice Khullar (as she then was) held that Romaine J. had “incorrectly identified the purpose of s 178(1)” and engaged in “a bit of reverse engineering”, and that her “purposive and remedial approach . . . resulted in shifting the delicate balance achieved by Parliament” (*Hennig* (C.A.), para. 26). I agree. As professors Girgis and Telfer note, if such other debts or liabilities, including administrative penalties, “are to survive bankruptcy discharge, it should be through a clear and intentional exemption provided by Parliament, not

because of a court’s overly broad interpretation of an exception to the discharge” ((2023), at p. 454; see also Nocilla, at p. 187; *Hennig* (C.A.), at para. 102).

[107] The administrative penalties are not the direct result of the Poonians’ fraudulent misrepresentation. They do not survive a discharge from bankruptcy under s. 178(1)(e).

(ii) The Commission’s Disgorgement Orders Did Result From the Fraudulent Scheme

[108] While the administrative penalties did not result from the Poonians having obtained property by fraudulent misrepresentation, the situation is different for the disgorgement orders.

[109] The disgorgement orders were made under s. 161(1)(g) of the *Securities Act* and represent the value of the Poonians’ fraud — the funds that the Poonians gained as a result of their market manipulation. Section 161(1)(g) states:

161 (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:

...

- (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;

Thus, where a person has not complied with a provision of the *Securities Act*, the Commission may order that person to pay to the Commission any amount obtained as a result of the failure to comply.

[110] The purpose of this section “is to compel a wrongdoer to give up any ill-gotten amounts” (2017 BCCA 207, 95 B.C.L.R. (5th) 319 (“*Poonian* (2017)”), at para. 81). By taking away the amounts obtained as a result of a contravention of the *Securities Act*, the section “deprives a person who fails to comply of any benefit” (para. 82; see also para. 100).

[111] Sections 15 and 15.1 of the *Securities Act* address what the Commission must do with the funds received from s. 161(1)(g) disgorgement orders. Section 15.1 and the *Securities Regulation*, B.C. Reg. 196/97, set out a notice and claims procedure for persons who have suffered a pecuniary loss as a direct result of misconduct that resulted in an order under s. 161(1)(g). The Commission must publish a notice if it receives money from an order under s. 161(1)(g) (s. 15.1(1)). A person may make a claim to the money by submitting an application (s. 15.1(2)). If the Commission receives such an application, it will administer the claim in accordance with the regulations, and pay to the applicant all or part of the amount claimed (s. 15.1(3)).

[112] As noted by the British Columbia Court of Appeal, s. 161(1)(g) deters persons from contravening the *Securities Act* by removing the incentive to contravene, because it strips them of the benefit of their wrongdoing (*Poonian* (2017), at para. 88). When issuing an order under s. 161(1)(g), the Commission may deduct any amounts

already returned to the victim or victims (para. 143). The amounts owed under disgorgement orders thus represent the amounts the debtor obtained as a result of his or her wrongful conduct. Furthermore, though compensation is not the *purpose* of this section, compensation is a possible effect of a s. 161(1)(g) order, because restitution may occur via the s. 15.1 claims procedure (paras. 75-76).

[113] The amounts that the Poonians have been ordered to pay under s. 161(1)(g) represent the amounts they obtained as a result of their fraudulent market manipulation. There is therefore a direct link between their fraudulent conduct and the Commission's disgorgement orders. While I have concluded that the Commission need not have been directly victimized by the Poonians' conduct in order to claim that the disgorgement orders are non-dischargeable under s. 178(1)(e), the victim investors may very well be the ultimate recipients of the sums of which they were deprived, provided that they submit appropriate claims in accordance with the s. 15.1 procedure.

[114] The Commission's disgorgement orders are captured by the s. 178(1)(e) exception and will not be released by any order of discharge.

VI. Conclusion

[115] I would overturn the Court of Appeal's conclusion that the Commission's administrative penalties are debts not released by any order of discharge because they fall within s. 178(1)(e) of the *BIA*. I would affirm the Court of Appeal's conclusion that the Commission's disgorgement orders come within the purview of s. 178(1)(e). The

disgorgement orders thus remain enforceable against the Poonians and survive any order of discharge under the *BIA*. I would also uphold the Court of Appeal's conclusion that neither the administrative penalties nor the disgorgement orders are exempt from discharge pursuant to s. 178(1)(a).

[116] Therefore, the appeal is allowed in part and the chambers judge's order is set aside in part. The Commission's application for a declaration that the amounts the Poonians owe to the Commission pursuant to the Sanctions Decision (i.e. the administrative penalties) shall not be released by any order of discharge is dismissed. For clarity, the chambers judge's order that the amounts the Poonians owe to the Commission pursuant to the Reassessment Decision (i.e. the disgorgement orders) shall not be released by any order of discharge is upheld. In the particular circumstance of this appeal, I would not award costs.

The reasons of Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

[117] I agree with Justice Côté, for the reasons she gives, that the administrative penalties and the disgorgement orders imposed by the British Columbia Securities Commission do not survive bankruptcy under s. 178(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

[118] We part company, however, on interpreting the scope of the causation requirement contemplated by the words “resulting from” in s. 178(1)(e) of the *BIA*. I do not accept that “any debt or liability” is limited to the *value* of the property obtained by deceit (s. 178(1)(e)). I conclude, as did the British Columbia Court of Appeal (2022 BCCA 274, 65 B.C.L.R. (6th) 213), that both the disgorgement orders and the administrative penalties fall within s. 178(1)(e) as “any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation”. Thus, both orders survive bankruptcy. I would dismiss the appeal.

[119] The bankrupts, Thalbinder Singh Poonian and Shailu Poonian, engaged in a “complex, predatory and highly deceptive . . . scheme that targeted unsophisticated investors” facing financial distress (2021 BCSC 555, at para. 31 (CanLII); see also 2015 BCSECCOM 96 (Sanctions Decision), at para. 18 (CanLII)). The Commission found that the bankrupts manipulated the market, contravening s. 57(a) (now s. 57(1)(a)) of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, a deemed offence under that Act. Based on this, the Commission sanctioned the Poonians in the public interest, with disgorgement orders under s. 161(1)(g) of the *Securities Act* of about \$5.6 million; and administrative penalties under s. 162(1) totalling \$13.5 million.

[120] The Poonians’ market manipulation scheme satisfied the condition of s. 178(1)(e) of the *BIA* that property be obtained as a result of their false pretences or fraudulent misrepresentations. They obtained about \$5.6 million through their scheme

(Côté J.’s reasons, at paras. 99-100; see also 2018 BCSECCOM 160, at paras. 77-79 (CanLII)).

[121] Thus, the only remaining question is whether the debts or liabilities at issue “result from” the Poonians’ deceitful conduct. Are the different monetary sanctions the Commission imposed “resulting from” the fact that property was obtained by false pretences or fraudulent misrepresentation?

[122] In answering this question, I share a number of Côté J.’s conclusions, for the reasons she gives. The property need not directly pass to the bankrupt; the “person perpetrating the fraud” need not be the person who obtained the property (para. 72, citing *Varvis (Bankrupt), Re*, 1999 ABQB 853, 254 A.R. 197, at para. 8). It is enough if someone associated with the bankrupt benefits (Côté J.’s reasons, at paras. 71-73). Further, s. 178(1)(e) does not require that the person claiming the exemption be the person who has directly sustained the loss as a result of the false pretences or fraudulent misrepresentation (paras. 83-95).

[123] Rather, what is required is simply that the deceitful conduct be that of the bankrupt, as long as someone associated with them has obtained property or services by pretences that the bankrupt knew to be false. The passing of property or services ensures that abstract fraudulent statements do not trigger the application of the exception when they have not resulted in detrimental reliance (see Côté J.’s reasons, at para. 74, citing *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 925, 160 O.R. (3d) 205, at para. 30).

[124] The more difficult issue, however, is the degree of link required between the debt and the deceitful behaviour. Given the scheme of the *BIA* and its broader purpose of financial rehabilitation, the non-discretionary exception in s. 178(1)(e) must be interpreted narrowly. It is common ground that there must be a direct link between the debt or liability claimed and the fraudulent statement (Côté J.’s reasons, at para. 77, citing *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 31; *Shaver-Kudell*, at para. 35; *The Workers’ Compensation Board v. Petkau*, 2018 SKCA 85, 429 D.L.R. (4th) 92, at para. 45; *Pietrzak, Re* (2016), 39 C.B.R. (6th) 145 (Ont. S.C.J.), at para. 9; *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143, at para. 28; *Groupe Unigesco inc. v. Michaud*, 2021 QCCQ 10330, at paras. 18-20 (CanLII); *Water Matrix Inc. v. Carnevale*, 2018 ONSC 6436, 65 C.B.R. (6th) 109, at para. 61; *Dead End Survival, LLC v. Marhasin*, 2020 ONSC 766, 77 C.B.R. (6th) 299, at para. 22). I too would reject a weak link such as “in respect of”, “in connection with”, “in relation to” or “but for” (Côté J.’s reasons, at paras. 75 and 78). A direct causal link between the creation of the debt or liability and the debtor’s deceit is required by the language “resulting from”, in an exception that must be narrowly construed (paras. 74-75).

[125] But I would not go further and require that there must be a direct correspondence between the *value* of the debt or liability and the *gain* made by the bankrupt or the person associated with the bankrupt. My colleague reasons that because there must be detrimental reliance in the form of a transfer of property or service, the quantum of the non-dischargeable debt or liability must be limited to “only the value”

obtained as a result of the deceit (para. 102; see also para. 76). I disagree. While the exception must be interpreted narrowly, it must be tethered to the provision fashioned by Parliament.

[126] Just as s. 178(1)(e) does not require that there be an exact correlation between the person claiming the exemption and the victims of that deceitful conduct, it does not require that the *quantum* of the debt or liability be limited by the *quantum* of the property obtained as a result of that deceitful conduct. Such a requirement is unsupported by the jurisprudence, is not found in the text of the provision, and is inconsistent with the provision's central focus. The central focus is the deceitful *conduct* at the source of the debt or liability, not the exact *gain* derived thereby.

[127] Section 178(1)(e) has been applied by courts to permit the exemption of debts or liabilities that exceed the value of the bankrupt's gain. If the quantum of the debt or liability under s. 178(1)(e) was limited to the value of property obtained, neither compensatory damages exceeding the value of the gain nor punitive damages awarded at private law would ever be exempt from discharge under s. 178(1)(e).

[128] Unsurprisingly, it is hard to find a single instance when courts have limited the recovery of punitive damages against a bankrupt, under s. 178(1)(e), on the basis that it would exceed the value of the property obtained by the bankrupt. On the contrary, the jurisprudence overwhelmingly shows that if punitive damages directly result from the deceitful conduct targeted by s. 178(1)(e), they qualify for the exception (see, e.g., *Grewal v. Brar*, 2015 MBQB 3, 313 Man. R. (2d) 94, at para. 30; *Bank of Montreal v.*

1886758 Ontario Inc., 2022 ONSC 4642, 1 C.B.R. (7th) 213, at paras. 38 and 45; *A.J. Lanza Fruits & Vegetables Ltd. v. United Farmers*, 2024 ONSC 1780, 12 C.B.R. (7th) 371, at paras. 79 and 82; *Celanese Canada Inc. v. Murray Demolition Corp.*, 2010 CanLII 29089 (Ont. S.C.J.), at paras. 14 and 22; *Horth v. Lalonde-Rousseau*, 2021 QCCQ 3668, at paras. 102 and 119-21 (CanLII); *Maison des jeunes de Contrecoeur v. Bourdon*, 2011 QCCQ 3476, at paras. 103-7 (CanLII); *Vivacqua v. Contino*, 2009 CanLII 14574 (Ont. S.C.J.), at paras. 18-23; *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301, at paras. 3 and 24; see also *Dead End Survival*, at paras. 28-30).

[129] The cases my colleague relies on, as noted above, help show that a weak link is not enough to satisfy the requirements of s. 178(1)(e). An overly broad causation threshold would stray from a narrow reading of s. 178(1)(e). For the threshold to be met, the conduct must be at the source, or origin, of the debt or liability. The deceitful conduct must have directly created it. But none of those cases stand for the proposition that a strict causation test requires the debt or liability to be limited to the value of the property obtained.

[130] Instead, as Roderick J. Wood notes, a direct causation requirement means that where only part of a liability can be traced to deceitful conduct, but not the balance, only the part induced by fraudulent conduct will be exempt from discharge (*Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 317-18). Courts can and should undertake an apportionment exercise to determine the part of a debt or liability that can be

attributed to fraudulent conduct. This exercise is “consistent with the fresh start policy underlying bankruptcy law” (p. 318), as it ensures bankrupts can obtain the benefit of a discharge for the part of the total debt that was incurred honestly (*Copper Cliff Community Credit Union Ltd. v. Parker* (1977), 18 O.R. (2d) 49 (C.A.), at p. 54; see also J. Sarra, G. B. Morawetz and L. W. Houlden, *The 2024 Annotated Bankruptcy and Insolvency Act* (2024), at § 7:202).

[131] But where a debt or liability is *entirely* caused by fraudulent conduct, such as punitive damages imposed to sanction the conduct, there is no reason to limit the application of s. 178(1)(e) only to the gain ultimately obtained by the bankrupt (or someone associated with the bankrupt).

[132] In *Goldstein, Re*, 2011 ONSC 561, 74 C.B.R. (5th) 296, a lawyer, Mr. Goldstein, obtained mortgage funds as a result of false pretences. Given this fraudulent conduct, the Law Society of Upper Canada held a hearing to disbar him. The costs award Mr. Goldstein was ordered to pay in relation to the disbarment hearing was found not to “result from” the underlying fraud for the purposes of s. 178(1)(e).

[133] The circumstances in *Goldstein* differ from those in this case. The costs award was a step removed from and thus not “directly caused” by the fraudulent conduct. The source or origin of the liability was the disbarment hearing, not the false pretences (paras. 10-11). It cannot be said that the debt resulted from the fraudulent conduct itself. The purpose of a disbarment hearing is not to impose or recover payment on “any debt or liability” envisaged by s. 178(1)(e).

[134] Here, by contrast, the purpose of the Commission’s hearing was to create such a debt or liability resulting directly from the false pretences. The amounts the Commission submits should survive discharge (which do not include costs) thus have as their *only* source or origin the Poonians’ deceitful conduct. Both the disgorgement orders and the administrative penalties under the *Securities Act* are monetary sanctions for the unlawful conduct. This is not a step removed. As my colleague notes, the breach of the *Securities Act* is factually based on obtaining property by false pretences or fraudulent misrepresentation within the meaning of s. 178(1)(e) of the *BIA* (paras. 99-100).

[135] Granted, the administrative penalties include an element of general deterrence for the “egregious” nature of the conduct and the magnitude of the scale on which it took place (Sanctions Decision, at paras. 18 and 92). Administrative penalties imposed under the *Securities Act* deter particular conduct and induce compliance (*British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 59; *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672, at paras. 58-62). But like punitive damages imposed at private law, the administrative penalties arise directly from the type of conduct that they sanction. Nothing in s. 178(1)(e) excludes a debt or liability that has an element of general deterrence (or compensatory damages that exceed the gain), provided it directly results from obtaining a financial benefit through false pretences or fraudulent misrepresentations. To exclude administrative penalties on that basis amounts to reading in an additional limitation that is found nowhere in the text of the provision.

[136] Limiting the debt or liability based on the value of the gain derived by the bankrupt is not only absent from the text, it is also inconsistent with the purpose of the exception set out in s. 178(1)(e). As this court has acknowledged, the financial rehabilitation of the bankrupt has its limits (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 37). The general availability of a discharge — a fresh start — is limited by the exceptions in s. 178(1), which reflect policy choices that some debts or liabilities should survive bankruptcy. They are “the kind of claims that society, through Parliament, considers to be of a quality that outweighs any possible benefit in the bankrupt being relieved of them” (Sarra, Morawetz and Houlden, at § 7:185; *Jerrard v. Peacock* (1985), 37 Alta. L.R. (2d) 197 (Q.B.), at p. 206).

[137] Many exceptions provided for in s. 178(1) ensure that only “honest but unfortunate” debtors can benefit from a discharge (Sarra, Morawetz and Houlden, at § 7:69). They are based on society’s view, reflected by Parliament, that a bankrupt should not be free of some types of debts or liabilities where they are the direct consequences of an undesirable conduct. Parliament has determined that some bankrupts simply do not deserve to be free of particular debts, based on the nature of the conduct giving rise to those debts. These exceptions are focused not on the person claiming the exemption but on “categories of specific wrongful conduct that give rise to debts that are not released” (*Shaver-Kudell*, at para. 39). For example, the following all survive bankruptcy because the principle of financial rehabilitation gives way to society’s denunciation of these kinds of conduct: fines or penalties imposed by a court in respect of an offence (s. 178(1)(a)); damages awarded in respect of intentional

infliction of bodily harm or sexual assault (s. 178(1)(a.1)); and debts or liabilities arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity (s. 178(1)(d)). The objective is to prevent abuse of the fresh start principle, and the focus is the nature of the wrongful conduct.

[138] A similar objective animates s. 178(1)(e). It is a “moral sanction” aimed at preventing the bankrupt from being rewarded by a release of liability because of their undeserving conduct that has resulted in detrimental reliance (*Shaver-Kudell*, at para. 40; *Simone v. Daley* (1999), 43 O.R. (3d) 511 (C.A.), at pp. 521-22; *Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82, at para. 15; *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 255 Man. R. (2d) 45, at paras. 109-16). Section 178(1)(e) should ultimately be interpreted purposively so as to “ensure that dishonest debtors do not benefit from their dishonesty” (*McAteer v. Billes*, 2006 ABCA 312, 397 A.R. 365, at para. 10; see also *Alberta Securities Commission v. Hennig*, 2020 ABQB 48, 8 Alta. L.R. (7th) 177, at para. 66, rev’d 2021 ABCA 411, 34 Alta. L.R. (7th) 219).

[139] I agree with Romaine J. in *Hennig* (Q.B.) that an interpretation of s. 178(1)(e) that considers the provision’s intention to preclude dishonest debtors from benefitting from their dishonesty “would surely extend to a decision of a securities commission, charged with enforcing securities laws in order to protect the [interests of the] public and promoting the integrity of the capital markets” (para. 76). The Commission is “a regulatory authority representing the interests of those affected by

the fraudulent misrepresentations and/or false pretences” (para. 76) and as a result, its administrative penalties should not be treated as if they were a debt stemming from an unrelated creditor seeking to unduly invoke s. 178(1)(e).

[140] Focusing only on the gain derived in the abstract would circumvent the precise mischief s. 178(1)(e) was meant to address, as it would permit bankrupts to benefit from their dishonesty through a release of liability, even when the debt directly results from the specific misconduct targeted by Parliament. Rehabilitation of the bankrupt is not best served if the bankrupt can obtain a discharge for liabilities directly resulting from fraudulent conduct.

[141] In conclusion, both the disgorgement orders and the administrative penalties are monetary sanctions imposed because of, and thus resulting from, deceitful conduct that Parliament specifically sought to address. They are both debts that originate from the Poonians having obtained property by false pretences or fraudulent misrepresentations. Accordingly, both properly fall within the narrow scope of s. 178(1)(e) and should not be released by any order of discharge.

[142] I would dismiss the appeal.

*Appeal allowed in part without costs, KARAKATSANIS and MARTIN JJ.
dissenting in part.*

Solicitors for the appellants: Reedman Law, Vancouver.

Solicitors for the respondent: Lawson Lundell, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Crown Law Office — Civil, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General, Legal Services Branch, Victoria.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan — Legal Services Division, Civil Law Branch, Regina.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: Gowling WLG (Canada), Toronto.

Solicitor for the intervener the Superintendent of Bankruptcy: Attorney General of Canada, Department of Justice Canada — Civil Litigation Section, Ottawa.

Solicitors for the intervener the Federation of Law Societies of Canada: Hunter Litigation Chambers, Vancouver.

Solicitors for the intervener the Alberta Securities Commission: Dentons Canada, Toronto.

Solicitor for the intervener the Ontario Securities Commission: Ontario Securities Commission, Toronto.

Solicitors for the intervener the Osgoode Investor Protection Clinic: Stockwoods, Toronto.

TAB 21



CANADA

CONSOLIDATION

CODIFICATION

Canada Evidence Act

Loi sur la preuve au Canada

R.S.C., 1985, c. C-5

L.R.C. (1985), ch. C-5

Current to October 28, 2025

À jour au 28 octobre 2025

Last amended on August 19, 2024

Dernière modification le 19 août 2024

Communications during marriage

(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

(4) and (5) [Repealed, 2015, c. 13, s. 52]

Failure to testify

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

R.S., 1985, c. C-5, s. 4; R.S., 1985, c. 19 (3rd Supp.), s. 17; 2002, c. 1, s. 166; 2014, c. 25, s. 34, c. 31, s. 27; 2015, c. 13, s. 52.

Incriminating questions

5 (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

Answer not admissible against witness

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

R.S., 1985, c. C-5, s. 5; 1997, c. 18, s. 116.

Evidence of person with physical disability

6 (1) If a witness has difficulty communicating by reason of a physical disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.

Evidence of person with mental disability

(2) If a witness with a mental disability is determined under section 16 to have the capacity to give evidence and has difficulty communicating by reason of a disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.

Communications faites durant le mariage

(3) Nul ne peut être contraint de divulguer une communication que son conjoint lui a faite durant leur mariage.

(4) et (5) [Abrogés, 2015, ch. 13, art. 52]

Défaut de témoigner

(6) Le défaut de la personne accusée, ou de son conjoint, de témoigner ne peut faire le sujet de commentaires par le juge ou par l'avocat du poursuivant.

L.R. (1985), ch. C-5, art. 4; L.R. (1985), ch. 19 (3^e suppl.), art. 17; 2002, ch. 1, art. 166; 2014, ch. 25, art. 34, ch. 31, art. 27; 2015, ch. 13, art. 52.

Questions incriminantes

5 (1) Nul témoin n'est exempté de répondre à une question pour le motif que la réponse à cette question pourrait tendre à l'incriminer, ou pourrait tendre à établir sa responsabilité dans une procédure civile à l'instance de la Couronne ou de qui que ce soit.

Réponse non admissible contre le témoin

(2) Lorsque, relativement à une question, un témoin s'oppose à répondre pour le motif que sa réponse pourrait tendre à l'incriminer ou tendre à établir sa responsabilité dans une procédure civile à l'instance de la Couronne ou de qui que ce soit, et si, sans la présente loi ou toute loi provinciale, ce témoin eût été dispensé de répondre à cette question, alors, bien que ce témoin soit en vertu de la présente loi ou d'une loi provinciale forcé de répondre, sa réponse ne peut être invoquée et n'est pas admissible en preuve contre lui dans une instruction ou procédure pénale exercée contre lui par la suite, sauf dans le cas de poursuite pour parjure en rendant ce témoignage ou pour témoignage contradictoire.

L.R. (1985), ch. C-5, art. 5; 1997, ch. 18, art. 116.

Témoignage de personnes ayant une déficience physique

6 (1) Le tribunal peut ordonner la mise à la disposition du témoin qui éprouve de la difficulté à communiquer en raison d'une déficience physique, des moyens de communication par lesquels il peut se faire comprendre.

Capacité mentale du témoin

(2) Le tribunal peut rendre la même ordonnance à l'égard du témoin qui, aux termes de l'article 16, a la capacité mentale pour témoigner mais qui éprouve de la difficulté à communiquer.

TAB 22



ALBERTA

RULES OF COURT

© Published by Alberta King's Printer

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

Information note

Rule 8.1 *[Mode of trial]* requires the mode of trial of an action to be by judge alone unless otherwise ordered.

**Division 2
Summary Judgment****Application for judgment**

7.2 On application, the Court may at any time in an action give judgment or an order to which an applicant is entitled when

- (a) admissions of fact are made in a pleading or otherwise, or
- (b) the only evidence consists of records and an affidavit is sufficient to prove the authenticity of the records in which the evidence is contained.

Application and decision

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

- (a) there is no defence to a claim or part of it;
- (b) there is no merit to a claim or part of it;
- (c) the only real issue is the amount to be awarded.

(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

(3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

- (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
- (b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;
- (c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

(4) If the application is unsuccessful, the Court may

- (a) direct that all or part of the claim proceeds by a streamlined trial, and
- (b) make a procedural order respecting the streamlined trial.

AR 124/2010 s7.3;126/2023

TAB 23



CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to October 28, 2025

À jour au 28 octobre 2025

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or

Transaction avec les créanciers garantis

5 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers garantis ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres —

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

1997, c. 12, s. 125; 2005, c. 47, s. 131; 2019, c. 29, s. 140.

Claims

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

1997, ch. 12, art. 125; 2005, ch. 47, art. 131; 2019, ch. 29, art. 140.

Réclamations

Réclamations considérées dans le cadre des transactions ou arrangements

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l'autre.

Exception

(2) La réclamation se rapportant à l'une ou l'autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l'arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n'ait voté en faveur de la transaction ou de l'arrangement proposé :

a) toute ordonnance d'un tribunal imposant une amende, une pénalité, la restitution ou une autre peine semblable;

b) toute indemnité accordée en justice dans une affaire civile :

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

R.S., 1985, c. C-36, s. 19; 1996, c. 6, s. 167; 2005, c. 47, s. 131; 2007, c. 36, s. 69.

Determination of amount of claims

20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim

(i) pour des lésions corporelles causées intentionnellement ou pour agression sexuelle,

(ii) pour décès découlant d'un acte visé au sous-alinéa (i);

(c) toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors que la compagnie agissait, au Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire;

(d) toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation de la compagnie qui découle d'une réclamation relative à des capitaux propres;

(e) toute dette relative aux intérêts dus à l'égard d'une somme visée à l'un des alinéas a) à d).

L.R. (1985), ch. C-36, art. 19; 1996, ch. 6, art. 167; 2005, ch. 47, art. 131; 2007, ch. 36, art. 69.

Détermination du montant de la réclamation

20 (1) Pour l'application de la présente loi, le montant de la réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :

(a) le montant d'une réclamation non garantie est celui :

(i) dans le cas d'une compagnie en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, dont la preuve a été établie en conformité avec cette loi,

(ii) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue sous le régime de la *Loi sur la faillite et l'insolvabilité*, dont la preuve a été établie en conformité avec cette loi,

(iii) dans le cas de toute autre compagnie, dont la preuve peut être établie sous le régime de la *Loi sur la faillite et l'insolvabilité*, mais si le montant ainsi prouvable n'est pas admis par la compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier;

(b) le montant d'une réclamation garantie est celui dont la preuve pourrait être établie sous le régime de la *Loi sur la faillite et l'insolvabilité* si la réclamation n'était pas garantie, mais ce montant, s'il n'est pas admis par la compagnie, est, dans le cas où celle-ci est assujettie à une procédure pendante sous le régime de la *Loi sur les liquidations et les restructurations* ou de